(20,311.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 346.

WILLIAM NOTLEY, CHARLES NOTLEY, AND MARIA HUGHES, PLAINTIFFS IN ERROR,

vs.

CECIL BROWN AND ANTHONY LIDGATE, PROPONENTS OF THE WILL OF CHARLES NOTLEY, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

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1 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

RECORD.

In the Circuit Court of the Fourth Circuit, Territory of Hawaii. At Chambers. In Probate.

($2. Stamps)

In the Matter of the Estate of CHARLES NOTLEY, Deceased.

Petition for Probate of Will.

To the Honorable Gilbert F. Little, Judge of the Circuit Court of the Fourth Circuit:

Your petitioner, Cecil Brown of Honolulu, Oahu H. T. herewith presents to this Court the Last Will and Testament of Charles Notley, the elder & codicils deceased, and showeth as follows:

That said Charles Notley Sr. died in Honolulu Oahu T. H. on or about the second day of May A. D. 1902, being at that time a resident of Paauilo Hawaii and leaving estate in the Territory of Hawaii the probable value and character of which are as follows, viz:

Real Estate.

Ahupuaa of Kukaiau District of Hamakua, Hawaii T. H. Kuleana in Waipio Hawaii aforesaid and valued at $30,000.

Personal estate consisting of 2000 shares in Hamakua Mill Co. Bonds money in hand notes and mortgages &c &c. and valued at $270000.

That when said Will and codicils was executed the said Charles Notley Sr. was of the age of sixty years and upward, of sound mind and in every respect competent to make and publish a Will and Testament.

That said deceased left a* widow living, and as his heirs at
2 law and next of kin the persons whose names, residences and relationship are as follows, viz:

Charles Notley	son	Honolulu	ab't 42 years.
David Notley	"	"	" 40 "
Wm. Notley	"	Kalawao	38
Maria Hughes	daughter	Honolulu	36

That in said Will Josephine M. Barnard, John Notley, John Mullinger, Mary K. Notley widow Emma Danford, David F. Notley,

Wm. Notley, Maria Hughes, Charles Notley Jr. John Notley, Victoria Maria, Lilly and William Notley children of Charles Notley Jr. are named as Devisees and Legatees, and your petitioner and Anthony Lidgate of Paauilo Hawaii as Executors.

Wherefore your petitioner prays, That said Will may be admitted to Probate, and Letters Testamentary be issued to your petitioner and said Anthony Lidgate. And that this Honorable Court will therefor appoint a day for hearing, and order notice of the same to be given by publication to all persons interested herein.

Dated at Honolulu May 27th 1902.

(Signed) CECIL BROWN.

Subscribed and sworn to before me this 27 day of May 1902.

(Signed) GEO. L. BIGELOW,
[SEAL.] *Notary Public, 1st Judicial Circuit.*

(State if widow or widower.)

(Endorsed:) #53. Circuit Court Fourth Circuit. In Probate. Estate of Charles Notley the elder, deceased. Peti-ion for Probate of Will and Affid. Pub. pasted. Filed May 29th, 1902. Daniel Porter, Clerk. Vol. 11 Pgs. 343-4.

3 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

(Will and Two Codicils of Charles Notley, Deceased.)

"Know all men by these presents, that I Charles Notley, of Paauilo, in the District of Hamakua, Island of Hawaii, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking and making null and void all wills by me heretofore made.

"I hereby nominate and appoint Thomas Rain Walker, of Honolulu, Island of Oahu, and Anthony Lidgate of Paauilo, in the Island of Hawaii, to be the Executors and Trustees of this my last will and testament, to serve as such without giving bonds.

"First. I give, devise and bequeath unto Miss Josephine M. Barnard of Laupahoehoe, Island of Hawaii, the sum of One Thousand Dollars.

Second. I give, devise and bequeath unto my brother John Notley of Edgervare Road, Burnt Oak, London, England, the sum of Five Hundred Dollars; but in the event of my said brother John dying before me, then I give, devise and bequeath said sum of Five Hundred Dollars to Charlotte Notley, the wife of my said brother John, and in the event of the death of the said Charlotte Notley before me, then I give, devise and bequeath said sum of Five Hundred Dollars to Ada Baker of Edgervare Road, aforesaid,

the granddaughter of my said brother John and his said wife Charlotte Notley.

"Third. I give, devise and bequeath unto John Mullinger of South Lopham, County of Norfolk, England, the sum of Five Hundred Dollars.

"Fourth. I give, devise and bequeath unto my son David Fyfe Notley and his heirs my homestead lot or dwelling house and premises situate at Paauilo aforesaid, together with all and singular the furniture, crockery, plate, pictures, linen and house-
4 hold furniture of every kind as well as all carriages and other vehicles used for pleasure or otherwise, being in and upon the said building and premises.

"Fifth. I give, devise and bequeath to my wife Mary K. Notley, and my children William Notley, Maria, the wife of Thomas Hughes, and David Fyfe Notley, and my niece Emma Danford, née Mullinger, the proceeds in money arising from and out of the Policy of Insurance on my life No. 126095 in the New York Mutual Life Insurance Company, share and share alike.

"Sixth. All the rest, residue and remainder of my estate, real, personal or mixed, and wherever situate, I give, devise and bequeath unto the said Thomas Rain Walker and Anthony Lidgate, in trust nevertheless for the uses and purposes herein set forth, that is to say: to pay the rents, issues and profits arising from and out of my said estate in manner following:

"One-sixth thereof to my wife Mary K. Notley during the term of her natural life, such payments to be in lieu of her dower right in my estate, and from and after the death of my said wife, the said one-sixth share or part of said income shall be divided among the surviving devisees named in this my will in the shares and proportions hereinafter set forth and limited to each of them.

"One-sixth thereof to my son William during the term of his natural life, and from and after the death of my said son William, then to Melisa, the wife of said William, during the term of her natural life; and from and after the death of the said Melisa, the said one-sixth share or part of said income shall be divided among the surviving devisees share and share alike.

"One-sixth thereof unto the children of my son Charles Notley Jr., named, John, Victoria, Maria, Lilly and William, share and share alike. And I hereby direct my said Trustees not
5 to pay any of said share of the said income unto any of the above named children of my said son Charles Notley Jr. until such time as each of them, being males, shall arrive at the age of twenty-one years, and, being females, shall arrive at the age of eighteen years; and that in the meantime and until the happening of such event as to each of said children, I direct my said Trustees to keep said one-sixth share of said income invested in such securities as they or their successors may think proper, and the income, rents, issues or profits thereof shall be divided equally among said children upon the arrival of them at the age of twenty-one and eighteen years respectively as hereinbefore limited. And in the event of the death of any of said children

before the arriving at the ages aforesaid, or in the event of their death after the arrival at the ages aforesaid, the heirs of such children shall take the share of the child so dying.

"One-sixth thereof unto my daughter Maria, the wife of Thomas Hughes, during the term of her natural life, free from all control or liability of the marital rights of any husband.

"One-sixth thereof to my son David Fyfe Notley, during the term of his natural life, and

"One-sixth thereof to my niece Emma Danford, née Mullinger, during the term of her natural life free from all control or liability of the marital rights of any husband.

"And from and after the death of all my said children and my said niece Emma Danford, neé Mullinger, I hereby direct my said Trustees or their successors to convey all of my estate among the heirs-at-law of my said children William, Maria, David Fyfe, and my said niece Emma Danford, née Mullinger, and the children of my said son Charles Notley, Jr., namely:—John, Victoria, Maria, Lilly and William, share and share alike.

6 "And I direct, that until the death of all the legatees last named, the income accruing from said trust estate, shall, until such event happen, be paid among the heirs-at-law of all such as may have died before the death of the survivor of said last named legatees.

"In the event of the death, resignation or any disability of my said Trustees or either of them, I hereby direct the Court having jurisdiction of the Probate matters and wherein my will is probated to appoint a new Trustee or Trustees as the case may be.

"I hereby authorize and empower my said Trustees or their successors to make such changes and alterations in the nature and kind of investments of my estate and vary the same in such manner as in their discretion will result to the best advantage of said estate, and also to use, handle, control, invest and reinvest all property belonging to said estate in such manner as to them shall seem proper for the best interest of those interested in said estate.

"In witness whereof, I have hereunto set my hand and seal this 18th day of May, 1899.

(Signed) CHAS. NOTLEY. [SEAL.]

"Signed, sealed, published and declared by the said Charles Notley as and for his last will and testament in the presence of us, who in his presence and in the presence of each other, and at his request, have hereunto set our hands as witnesses this 18th day of May, 1899.

"(Signed) CECIL BROWN, *Honolulu.*
"(Signed) FRANK F. FERNANDES, *Honolulu.*
"(Signed) ALEX. ST. M. MACKINTOSH, *Honolulu.*"

7 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

"Codicil to the Last Will and Testament of Me, Charles Notley, the Elder, of Paauilo, in the District of Hamakua, Island of Hawaii, Which Bears Date the 18th Day of May, 1899.

"Whereas, by my said last will and testament I have appointed Thomas Rain Walker to be one of the Executors and Trustees thereof, and as the said Thomas Rain Walker intends to depart out of the Territory of Hawaii and reside in England, I am desirous that Cecil Brown of Honolulu, in the Island of Oahu, shall be substituted as a trustee and executor of my said Will, and to serve as such in the place of said Thomas Rain Walker.

"Now, therefore, I do hereby revoke the appointment of said Thomas Rain Walker as such executor and trustee, and do hereby nominate and appoint the said Cecil Brown to be an executor and trustee of my said last will and testament in the place and stead of said Thomas Rain Walker, and to serve as such without giving bonds.

"And I declare that my said last will and testament shall be construed and take effect as if the name of the said Cecil Brown were inserted therein throughout instead of said Thomas Rain Walker's name. In all other respects I confirm my said Will.

"In witness Whereof I have hereunto set my hand and seal at Paauilo aforesaid, this 2nd day of August, 1900.

"(Signed) CHARLES NOTLEY.

"Subscribed by the Testator in the presence of each of us, and at the same time declared by him to us to be a codicil to his last will and testament, and thereupon, we, at his request, sign our names hereto as witnesses, this second day of August, 1900.

"(Signed) WM. H. SIEBECKER.
"(Signed) J. LEONHART."

8 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

"This is a second codicil to my last Will and Testament which bears date the 18th day of May, 1899.

"First: I hereby ratify and confirm my said Will and the first codicil thereto in every respect, save and except so far as the said Will and codicil is altered by and is inconsistent with this codicil.

"Second: I hereby revoke the fourth clause or subdivision of my said Will on page two thereof, being the devise to my son David Fyfe Notley of my homestead lot or dwelling house and premises and household furniture, etc., and other property therein mentioned, and in place thereof.

"I give, devise and bequeath unto my niece Emma Danford the wife of H. D. Danford, of Honolulu, in the Island of Oahu, all of that real property situate and being at Paauilo, in the District of Hamakua, Island of Hawaii, and Territory of Hawaii, at present occupied, used and enjoyed by me as my residence or homestead, and contains about four acres, together with all the household furniture, plate, silver-ware, linen and all and every other kind of fixtures and utensils therein or used in connection therewith, including the carriages, harnesses and horses used by me in said Hamakua, and being a part of my household property and generally used and enjoyed by me in connection therewith.

"To have and to hold the same unto the said Emma Danford, for her sole and separate use and behoof forever.

"Provided, however, and it is my wish, and I hereby declare that my wife Mary K. Notley shall have the use and occupation of the cottage that is upon said residence premises and which lies on the north side of the tennis grounds on said premises, together with all the use of the furniture and household fixtures in said cottage, for and during the term of her natural life.

9 "In Witness Whereof, I, Charles Notley, the elder, have hereunto subscribed my hand and seal at Honolulu, in the Island of Oahu and Territory aforesaid, this 11th day of April, 1902.

"(Signed) CHAS. NOTLEY. [SEAL.]

"Subscribed by the said Charles Notley, the elder, in the presence of each of us, and at the same time declared by him to us to be the second codicil to his last will and testament, and thereupon, we, at his request, and in his presence hereto sign our names as witnesses at Honolulu aforesaid, this 11th day of April, 1902.

"(Signed) CECIL BROWN, *Honolulu.*

"(Signed) FRANK F. FERNANDEZ, *Honolulu.*"

10 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. At Chambers. In Probate.

In the Matter of the Estate of CHARLES NOTLEY, Deceased.

Appearance and Contest by Mary K. Notley, Charles Notley, Jr., David Fyfe Notley, Maria Hughes (Née Notley), and William Notley of the Petition of Cecil Brown and Others to Admit to Probate a Certain Document as the Last Will and Testament of Charles Notley, Deceased.

Now comes Mary K. Notley, widow of Charles Notley aforesaid, deceased, residing within said Territory of Hawaii, and Charles Notley, Jr., David Fyfe Notley, Maria Hughes (Née Notley) and Wil-

liam Notley, all residing within said Territory of Hawaii, the children and heirs at law of the said Charles Notley, deceased, and do hereby enter their appearance as contestants to the probate of the alleged will and codicils thereto herein to be offered and offered by Cecil Brown, Esq., and others for probate as the last will and testament of the said Charles Notley, deceased, and do hereby contest the probate of said alleged will and codicil thereto for that contestants claim that said alleged will and codicils thereto offered or to be offered as aforesaid for probate herein are not the last will and testament of the said Charles Notley, deceased or any will and
11 testament of the said decedent and that the said alleged will so offered or so to be offered and so alleged to be and propounded as the last will and testament of the said Charles Notley, deceased, was together with the codicils thereto, subscribed, signed, sealed, published and declared by the said Charles Notley as and for his last will and testament and codicils thereto by, through and by virtue of the undue influence exercised by one Emma Danford, residing in the Territory of Hawaii, a beneficiary and legatee mentioned in said alleged will and codicils thereto, over the said Charles Notley, deceased, at the time of the subscribing, signing, sealing, publishing and declaring by the said Charles Notley, deceased of his alleged will and testament and codicils thereto as aforesaid, and that said alleged will and codicils thereto are void by reason of undue influence, these contestants alleging that they are the heirs at law and all of the heirs at law of the said Charles Notley, deceased, and are entitled to inherit his entire estate if said alleged will and codicils thereto are refused probate.

Contestants further allege that the said Charles Notley deceased intestate.

Wherefore contestants pray that said alleged will and codicils thereto be refused probate and be declared to be null and void and that decedent be declared by this Court to have deceased intestate and that the said Mary K. Notley, his widow, be appointed administratrix of said estate and that the court make such other and further decrees and orders in the premises as may be appropriate, and contestants will ever pray, etc.

(Signed) MELE K. NOTLEY.
" CHARLES NOTLEY, JR.
" DAVID F. NOTLEY.
" MARIS HUGHES.
" WILLIAM NOTLEY.

By His Attorneys, KINNEY, BALLOU & McCLANAHAN.

Dated, Honolulu, T. H., July 7th, 1902.

12 Endorsed: Circuit Court, Fourth Circuit. *In re* Matter of the Estate of Charles Notley, deceased. Appearance of Contestants. Filed July 10th, 1902. Daniel Porter, Clerk. Kinney, Ballou & McClanahan, Judd Bl'd'g.

13 [Stamped:] Supreme Court, Territory Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Circuit, Hawaiian Islands. In Probate. At Chambers.

In the Matter of the Estate of CHARLES NOTLEY, SR., Deceased.

Before Judge Gilbert F. Little.

Order of Probate.

The Petition of Cecil Brown praying for the probate of a document purporting to be the last Will and Testament of Charles Notley, deceased, and for the issuance of Letters Testamentary to Anthony Lidgate and said Cecil Brown, was heard on the 10th day of July, 1902, at which hearing due proof was made to this Court that due notice had been given by the Clerk that said Petition had been filed in this Court, and that a hearing of all concerned would be held at Hilo, Island of Hawaii, on the 10th day of July, 1902, at nine o'clock in the forenoon, and that said notice had been published in the Daily Evening Bulletin, a Newspaper, in Honolulu, three times, once a week for three weeks, and in the Hilo Tribune, a weekly newspaper printed and published in Hilo, three times.

That the said Charles Notley, Sr., died on or about the 2d day of May, 1902, at Honolulu, Oahu, and was at the time of his death, a citizen of the Territory of Hawaii and resident of Paauilo, Island of Hawaii, and left Estate within the jurisdiction of this Court.

That the said Estate is of about the value of $300,000 or thereabouts, and consists of as follows: Real Estate of the value of
14 about $50,000 and personal estate of the value of about $250,000.

That the heirs of said deceased are: Mary K. Notley, widow; Charles Notley, a son; David F. Notley, a son; William Notley, a son; and Maria Hughes, a daughter, the wife of Thomas Hughes; and the said Mary K. Notley, the widow, Charles Notley, David F. Notley, William Notley, and they by their attorneys, Messrs. Kinney, Ballou & McClanahan, and the said Maria Hughes by Messrs. Magoon & Peters, here attorneys, appeared and filed a protest to the probating of said will and it having been stipulated and consented to by all counsel, both for proponents and contestants, that the hearing on said petition for probate should be proceeded with and a *prima facie* case made out, and that the further hearing of evidence for and on behalf of contestants and proponents should be continued until the 18th day of September, 1902, in order that the evidence of one Mrs. Emma Danford, with other evidence, might then be offered and taken by contestants, and also such other evidence on the part of proponents rendered necessary or in the opinion of counsel for proponents considered necessary in the premises, by reason of the evidence produced and taken for and on be-

half of contestants might also then be offered and taken; and which stipulation above referred to has been duly filed in these proceedings; and it was ordered that the further hearing in this matter be, and the same was, continued until the 18th day of September, 1902, at 10 A. M. or as soon thereafter as counsel can be heard, such hearing to be had at the Court House in Hilo, Island of Hawaii, and that in the meantime Anthony Lidgate of Paauilo, in the District of Hamakua, Island of Hawaii, and Cecil Brown, of the City of Honolulu, Island of Oahu, Territory of Hawaii, be appointed as Temporary Administrators of said Estate and to act as such until the further order of this Court, and that they furnish a joint and Several bond in the penal sum of Twenty Thousand Dollars,
15 and that within thirty days they file in this Court an inventory of all the property coming to their possession or knowledge and belonging to said Estate; and whereas the hearing ordered by the order of this Court dated the 10th day of July, 1902, having been continued from the 18th day of September, 1902, to and until the 19th day of September, 1902, at 8 A. M. of said day, and said hearing having come on to be heard on this 19th day of September, 1902, before me in Chambers at the Court House in Hilo, Island of Hawaii, and it appearing that sufficient notice of the
E. B. M. former and of this hearing had been given to all parties
C. B. concerned, and Messrs. Kinney, B-lou & McClanahan appearing for contestants, the Court finds the following facts from the evidence adduced:

That the said Charles Notley did execute the will and codicils offered for probate, as follows, the said will on the 18th day of May, 1899, the first codicil thereto on the 2d day of August, 1900, and the second codicil thereto on the 11th day of April, 1902; the said will and the second codicil thereto at Honolulu, in the Island of Oahu, and the first codicil thereto at Paauilo, in the District of Hamakua and Island of Hawaii, the said will being executed in the presence of Cecil Brown, Alexander St. Martin Mackintosh, Frank F. Fernandes; the first codicil thereto in the presence of William H. Siebecker and J. W. Leonhart, and the second codicil thereto in the presence of Cecil Brown and Frank F. Fernandes as subscribing witnesses thereto; that the said Charles Notley, Sr., at the time of the execution of the said will and the codicils thereto was of sound and disposing mind and memory and was competent to make such will and the codicils thereto, and that the said will and codicils were duly executed as required by law, and that the execu-
E. B. M. tion thereof was not procured by Emma Danford, by
C. B. reason of any undue influence or otherwise and that in
16 said will and the codicils thereto the said Charles Notley, Sr., named Anthony Lidgate and Cecil Brown as executors and trustees to serve as such without giving bonds:

Wherefore it is ordered that said documents now in Court and hereto attached are hereby admitted to Probate as the last will and testament with the codicils thereto of said Charles Notley, Sr., and it is further ordered that Letters Testamentary issue to said Anthony Lidgate and Cecil Brown, to serve without giving bonds; that said

Anthony Lidgate and Cecil Brown as Temporary Administrators of the estate of said Charles Notley, Sr., file their accounts with the Clerk of this Court forthwith; that upon approval of said accounts the bondsmen of said Temporary Administrators be discharged from further responsibility or liability. That this order take effect from and after the approval of the accounts of said Temporary Administrators. That notice to creditors be published according to law, in the Daily Bulletin, a newspaper printed and published in Honolulu, Oahu, and in the Hilo Tribune, a newspaper printed and published in Hilo, Hawaii, and that an inventory of said estate be filed within thirty days from the date of going into effect of this order.

And it is further ordered that the allowance of Two Hundred and Fifty Dollars per month heretofore made and allowed to Mary K. Notley, the widow of said Charles Notley, Sr., for her support and maintenance, be continued and paid by Anthony Lidgate and Cecil Brown, the executors, until the further order of this Court.

Dated at Hilo, Hawaii, September 19, 1902.

(Sig.ed) GILBERT F. LITTLE,
[SEAL.] *Judge of the Circuit Court of the Fourth Circuit.*

17 Endorsed: Circuit Court Fourth Circuit. In Probate. In the Matter of the Estate of Charles Notley, Sr., deceased. Order of Probate. Filed September 19th 1902. Daniel Porter, Clerk. Vol. 11 Pgs. 346-7-8. Exhibit A Defendants.

18 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii. At Chambers. In Probate.

In the Matter of the Probate of the Will of CHARLES NOTLEY, Deceased.

Mary K. Notley, Charles Notley, Jr., David Fyfe Notley, William Notley, Marie Hughes (née Notley), Contestants.

Notice of Appeal and Appeal of the Above Named Contestants.

Now come the above named contestants Mary K. Notley, Charles Notley, Jr., David Fyfe Notley, Maria Hughes (Née Notley) and William Notley, by their attorneys Kinney, Ballou & McClanahan, and deeming themselves aggrieved by the decision and decree of the Honorable Gilbert F. Little, Judge of the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, sitting at Chambers in Probate in the above entitled matter dated the 19th day of September, A. D. 1902, rendered upon the petition of Cecil Brown, Esq., and others, dated the 27 day of May, A. D. 1902, praying for the probate of certain documents as being the last will and testament and codicils

thereto of the said Charles Notley, deceased, do hereby give notice of their intention to appeal and do hereby appeal from said decision and decree to the Circuit Court of the Fourth Judicial Cir-
19 cuit, Territory of Hawaii, in term time before a jury.
(Signed) KINNEY, BALLOU & McCLANAHAN,
Attorneys for Mary K. Notley, Charles Notley, Jr., David Fyfe Notley, Marie Hughes (née Notley), and William Notley.

Dated, Hilo, T. H., Sept. 20th, 1902.

Endorsed: Appeal to Circuit Court in Term. Filed September 30th, 1902. Daniel Porter, Clerk.

20 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Circuit, Territory of Hawaii. In Probate. At Chambers.

In the Matter of the Estate of CHARLES NOTLEY, SR., Deceased.

Before Judge Gilbert F. Little.

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21 In the Circuit Court of the Fourth Circuit, Territory of Hawaii. In Probate. At Chambers.

In the Matter of the Estate of CHARLES NOTLEY, SR., Deceased.

Before Judge Gilbert F. Little.

Counsel:
Cecil Brown for Executors.
Mr. Wm. L. Stanley for Mrs. Emma Danforth and child.
Messrs. Kinney, Ballou & McClanahan for Contestants.

Mr. McCLANAHAN: I desire to file the appearance and contest of Mary K. Notley, Charles Notley, Jr., David Fife Notley, Maria Hughes Notley and William Notley, all residing within the Territory of Hawaii, and enter their protest to the probate of the will of

Charles Notley, deceased. (Counsel reads their petition, which is then placed on file.)

Mr. Brown reads petition for probate of the will; also proof of publication.

DANIEL PORTER called and sworn.

Mr. BROWN: What is your occupation?

A. Clerk of the Fourth Circuit Court.

Q. Was it the order of the court that petition for probate of the will of Charles Notley be advertised in the Daily Evening Bulletin, a newspaper published in Honolulu?

A. It was.

Q. Can you state whether or not you know from an ex-
22 amination of the files of that paper whether the order of the court was complied with?

A. I can.

Q. Was the order published in the Daily Evening Bulletin?

A. It was published before I went to Hamakua. Several weeks ago I saw a copy of the paper and saw the advertisement in it. They have not yet sent me a copy of it for file.

Q. And a similar notice was published in the Tribune?

A. Yes, that is the paper (indicating newspaper on Clerk's desk).

COURT: The court always makes it a point to see that these things are properly obtained and filed, but in this case they did not send a copy up. When it comes it will be properly placed on file. I ordered it published over there out of courtesy to the counsel.

Mr. BROWN: I may state also that I saw the advertisement in the Bulletin myself. I now present the last will and testament of Charles Notley, the will dated 18th of May, 1899, duly executed by Mr. Notley in the presence of Cecil Brown, Alex. Mackintosh and Frank F. Fernandez; also two codicils, dated 2d of August, 1900, and 11th of April, 1902. (Mr. Brown reads will and codicils.)

COURT: The will and codicils are placed on file.

Mr. MCCLANAHAN: I desire to offer a stipulation which we ask to be allowed by this court. The stipulation has already been entered into between the counsel for the respective parties. (Counsel reads stipulation.)

The names of Mes-rs. Magoon & Peters are entered as counsel for Maria Hughes Notley, whose name appears in the stipulation now being presented by Mr. McClanahan, continuing the hearing of the case until the 18th day of September, 1902.

COURT: You may file this stipulation, subject to such modification as may be deemed expedient by you later on. (Stipulation is placed on file.)

23 Dr. GEORGE HERBERT called and sworn.

Mr. BROWN: What is your occupation, Doctor?

A. Physician and surgeon.

Q. Where?

A. In Honolulu.

Q. Did you know Charles Notley?

A. Intimately.
Q. Well?
A. Well.
Q. How long have you known him?
A. 18 years.
Q. Were you his physician?
A. I was.
Q. Did you see him during his last illness?
A. I did.
Q. What was the nature of that illness?
A. He had dysentery, congestion of the liver, congestion of the right lung.
Q. Do you know when he died?
A. He died on May the second of this year.
Q. Where?
A. In Honolulu.
Q. Do you know of what place he was a resident?
A. Yes; he resided at Honokaa, district of Hamakua.
Q. During the month of April of this year, from your knowledge and from your attendance and being the physician of Mr. Notley, will you state whether or not in your opinion he was competent to make a last will and testament, or a codicil to a last will and testament making disposition of his estate?
A. He was.
Q. From your knowledge and from your observation and treatment, would he be subject to a controlling influence of any person?

Mr. McClanahan: If the court please I have to object to that question as irrelevant and immaterial at this time.
Court: He is asking as an expert.
Mr. McClanahan: But what is before the court? It is proper rebuttal, certainly. Does the court think a foundation has been laid for Dr. Herbert to be asked as an expert on the influence of one person over another?
Court: This is the way I look at it. He was the physician during the last illness, and is asked whether he thought him competent to make a will.
24
Mr. McClanahan: To that I made no objection; it is as to the influence which one person might exert over another.
Court: I think that will be all right. Nobody has been attacked yet. He is asking whether Mr. Notley was mentally sound. I will overrule your objection and allow an exception.

A. No.
Court: Was he mentally whimsical or frail other than the disease would indicate?
A. No, sir, not at all.
Mr. McClanahan: Where was Mr. Notley living when he died?
A. At Mr. Danforth's home on Kinau street.
Q. Was that the home of Emma Danforth?
A. Yes, sir.
Q. How long had he been living there prior to his decease?

A. He came, ill, from his home straight to Mrs. Danforth's house. He was ill at the time; that is why he came down.

Q. Did he come down unaccompanied by anyone?

A. I don't remember.

Q. How soon after he came down did you meet him at the house of Mrs. Danforth?

A. I think he came to my office soon after his arrival.

Q. Did you have occasion to visit Mr. Notley at the Danforth home?

A. Frequently.

Q. Your partner also was in attendance?

A. Yes, sir.

COURT: Who was that?

A. Dr. Humphreys.

Mr. MCCLANAHAN: Were you the physician for the Danforth family?

A. Yes, sir.

Q. Dr. Humphreys was also?

A. Yes, sir.

Q. Did Mr. Notley have other physicians?

A. Within a few days prior to his death he had Dr. Hoffman.

Q. Prior to that you and Dr. Humphreys?

A. Yes, sir.

Q. Who of the Notley family were at the Danforth residence besides Mr. Notley?

A. Mr. Notley's wife came down, and his son.

Q. His wife came down when?

A. I can not tell you.

Q. Did she come down originally?

A. No, she came down probably in the month of April.

Q. When his illness had become dangerous?

A. Yes, when his illness had become dangerous.

Q. Do you know who sent for the wife to come down?

A. I do not.

Q. Did you have any talk relative to sending for his wife?

—. No, I did not.

Q. Did you have any talk with Mrs. Danforth relative to sending for his wife when his disease became dangerous?

A. She was already there.

Q. I understood she was sent for when his disease became dangerous?

A. No, sir, you put that question to me yourself.

Q. Was it at the instigation of any of the Danforth family that she came or any of the Notley family?

A. I do not know that.

Q. Were any other of the Notley family present at the Danforth residence during the illness of Mr. Notley?

A. Mrs. Maria Hughes, his daughter, was frequently there.

Q. Were you Mrs. Maria Hughes' physician?

A. I was.

Q. Do you know why Mr. Charles Notley, Sr., did not go to the home of his daughter, Mrs. Maria Hughes?

A. I do not know; it was customary for him to go to his niece's.

Q. Now, as a matter of fact, was there not illness in the Hughes family at the time Mr. Notley came down there ill?

A. Yes, there was, measles.

Q. A contagious disease?

A. A contagious disease.

Q. Do you know any other member of the Notley family who attended the father at the home of Emma Danforth?

A. One son.

Q. What was his name?

A. I do not know.

Q. Do you know any of the sons?

A. I know one by sight; I do not know his name.

26 Q. Where does he live?

A. I do not know that.

Q. How often did this son come there?

A. I can not tell you.

Q. Did you see him more than once?

A. Yes.

Q. Will you please state to the court if any other member of the Notley family came to the Danforth residence during the illness of Mr. Notley, other than Maria Hughes, this one son, and the widow, the wife then.

A. Not to my knowledge. I was not constantly at the house; they may have been there. The ones I saw were Maria Hughes, Mrs. Notley Sr., and a young man, William, I think.

Q. Did you see Mrs. Notley, wife of the deceased, at the Danforth home?

A. Yes.

Q. Do you know what part of the house she occupied?

A. She was usually in his room when I saw her.

Q. Whereabouts in his room?

A. Somewhere in the room, not always in the same place.

Q. Did you have occasion to attend Mr. Notley at night?

A. I do not think I was there in the night.

Q. Do you know where Mrs. Notley slept?

A. No, I do not know.

Q. You do not know where she stayed except in his room. Did she sleep in his bed?

A. I should think not; I do not know.

Q. Were there two beds in the room?

A. I do not think there were.

Q. Do not you know as a matter of fact that she slept on the floor?

A. I don't know that; it might have been.

Q. Do you know whether Mrs. Notley speaks English?

A. She does not.

Q. Does Mrs. Danforth speak English?

A. Yes.

Q. Does Mrs. Notley speak Hawaiian?

A. Yes.

27 Q. Who else attended Mr. Notley? I understood you to say Mrs. Notley, his wife, attended him?

A. I said she was in his room, I did not say she attended him.

Q. What was she doing there?

A. Not much of anything except looking on, I think.

Q. What was she doing when you came there?

A. Nothing, as a rule.

Q. She watched you, did she not, in your attendance upon the sick man?

A. I presume so.

Q. You did not watch her?

A. No.

Q. So you really do not know what she was doing?

A. No; at times I talked with her.

Q. Whom did you talk with with reference to the sick man when you were there?

A. Frequently with his wife and frequently with his daughter and frequently with Mrs. Danforth.

Q. Who had the care of Mr. Notley while he was sick?

A. In the first case Mrs. Danforth; in the second case a trained nurse; in the third the old lady herself, Mrs. Notley, to a certain extent, but she was assisted by the trained nurse.

Q. Now, tell me what you mean by the first instance or first case?

A. When he first came down he required little attendance, which Mrs. Danforth could give him, and no one but Mrs. Danforth could.

Q. How do you know that?

A. Because I saw it for myself.

Q. How long did Mrs. Danforth continue his attendant in the first stages of his illness?

A. Up to the early part of March somewhere.

Q. At that time did you get a trained nurse?

A. Yes..

Q. Who employed the trained nurse; did you find her?

A. Yes.

Q. Did Mrs. Danforth have anything to do with finding the trained nurse?

A. I do not think so.

28 Q. Who was the trained nurse?

A. I think it was Miss Freeny, to the best of my knowledge and belief.

Q. Where is she residing?

A. In Honolulu.

Q. Connected with some sanitarium?

A. No, just nursing.

Q. Are you not clear as to whom it was?

A. No, but I think it was Miss Freeny.

Q. How long was this trained nurse in attendance upon Charles Notley?

A. That I could not tell you.

Q. Well, she was in attendance commencing the early part of March, was she?
A. Some time in March, I think.
Q. And you can not say how long?
A. No, I can not say how long.
Q. Was Mrs. Notley, Sr., there at the time the trained nurse first went there?
—. That I could not tell you.
Q. Can you tell me when Mrs. Notley, Sr., first began to attend her husband?
A. No, I can not tell you that.
Q. When the nurse came did Mrs. Emma Danforth relinquish her care of the patient and turn it over to the trained nurse?
A. Yes.
Q. And did not assume that care again until his death?
A. I think not.
Q. Have you any doubt about that, Doctor?
A. I think not.
Q. The trained nurse had care of him during the serious part of his illness, until death?
A. Yes.
Q. Do you know where Mrs. Notley ate at the Danforth house?
A. I have no idea.
Q. How long was Mr. Notley confined to his bed?
A. I think it was a week or ten days; ten days probably.
Q. Is it not a fact that at every visit you made to Mr. Notley's sick room you found Emma Danforth there?
A. No.
Q. How often did you find her there?
A. I could not tell you.
Q. You did find her there?
A. Certainly.
29 Q. Both before and after Mrs. Notley was sent for and Mrs. Notley had arrived?
A. Occasionally she was there, all through.
Q. Did you ever hear any conversation in the room between Mrs. Notley and Mrs. Danforth?
A. No; it was hard for them to converse, because one spoke Hawaiian and one English.
Q. Did you hear any conversations between Mr. Notley and Mrs. Danforth?
A. I heard slight conversations, nothing to speak of, nothing of any importance.
Q. Did you hear any conversations with reference to the will?
A. None at all.
Q. Do you know when the old gentleman made the last codicil to his will?
A. I think it was on the 15th of February; I remember the time.
Q. You remember the time. Did he speak to you about making it?

A. No.
Q. Did you hear him speak to any one else about making the codicil?
A. No, I never heard him speak of it.
Q. Not to Emma Danforth?
A. Not a word.
Q. He was about at that time, was he?
A. Yes, he was moving around.
Q. How long after he made this second codicil that he took to his bed?
A. I think about a week.
Q. How long after he took to his bed did he die?
A. That was about a week longer, I think.
Q. So that he died approximately a couple of weeks after the second codicil?
A. Something like that.
Q. You have never attended Mr. Notley anywhere else except at the Danforth home?
A. And at my office; I never attended him anywhere else excepting there and at my office.
Q. How long did you know Mr. Notley?
A. I have known him for eighteen years.
Q. And he was the only member of the family you have known?
30 A. No, I have known some other members.
Q. What members have you known?
A. I knew another son.
Q. What was his name?
A. I could not tell you.
Q. Do you know Charles Notley, Jr.?
A. I do not know the names of the sons.
Q. You said that Mr. Notley would not be subject to the influence of any person. That is rather a broad statement, is it not, Doctor?
A. I do not think so.
Q. We are all subject to the influence of others more or less?
A. I said he was not liable to be subject to the influence of any special party.
Q. Of any special party; you mean by that he was not unlike us, or was he a strange, peculiar character that made him exempt from special liability to influence. We are liable, are we not, Doctor, to outside influence?
A. Yes, but——
Q. Did that liability not exist in his case as well as in the ordinary run of natures?
A. I meant that he was peculiarly strong in his character; he was firm; he was a man who would impress you as not easily influenced by any one.
Q. Strong in his likes and dislikes, was he not?
A. I do not know enough of him to say that.
Q. Was he what you call a strong character?

A. Yes, he was a strong character.

Q. Now, is a strong character one who makes friends and makes enemies, and was not that Charles Notley?

A. Yes.

Q. He was not a weak man?

A. No.

Q. I take it that when you made answer to Mr. Brown's question about being subject to a controlling influence you meant that he was a strong man and not a weak man mentally or physically.

A. Yes.

Q. You did not mean that he was lifted out of the possi-
31 bility or the danger of a controlling influence?

A. No, certainly not.

Q. Because we are all subject to influences?

A. Certainly, to a great extent.

Q. Do you know anything about the temperament of Mr. Notley; what kind of a temperament had he?

A. A very quiet, not a passionate man at all.

Q. A man whose thoughts and purposes in life were rather towards the somber, were they not? like a stream that runs deep; he was a deep man, was he not, for a man of little education?

A. Yes; he was but poorly educated.

Q. What was his nationality, do you know?

A. He was an Englishman.

Q. Do you know anything about his relationships, had he any relatives in this country?

A. I do not think so, no.

Q. You know nothing about that?

A. No.

Q. How old a man was he when he died?

A. About eighty, I think; I forget his exact age.

Q. Was he a man of violent temper?

A. I never saw him in any temper.

Q. During his illness did you see him communicate at all with his wife while she was in the room?

A. I have seen him talk to her.

Q. In the native language?

A. Yes; just a few words.

Q. What seemed to be the feeling existing between Mr. and Mrs. Notley at that time or at those times?

A. Mrs. Notley seemed grieved over her husband's illness; it is very difficult to say; in fact, I could not see any feelings between the two.

Q. You could not what?

A. I could not pick out, discern any special feeling between the two.

COURT: Is the question directed towards showing any es-
32 trangement or hostile feeling?

A. They appeared on good terms, but no signs of marked affection. She would talk to me and wring her hands.

Q. You speak the native language, do you?

A. I speak it poorly; I used to send for Mrs. Hughes when I wanted to talk to her.

Q. Did you hear any conversation pass between Mr. Notley and Mrs. Notley, any conversation between them?

A. No.

Q. You did not see Mr. Notley on the day he made the codicil to his will?

A. No, I did not see him on that day.

Q. When had you seen him prior to that?

—. I had seen him a few days prior to that; I could not tell you the day.

Q. You do not know his condition on the day he made the codicil?

A. Yes, he was all right on that day.

Q. How do you know that?

A. Because he was all right previously and after that day.

That is all.

COURT: How long have you known the deceased?

A. Eighteen years.

Q. As compared with his life, how was his mental condition during the six months preceding his death?

A. Exactly as it was during his previous life, clear and intelligent.

Mr. STANLEY: Doctor, you mentioned a son of Mr. Notley's being present at the house, whose name you can not recollect. Do you remember a son named David?

A. I can not remember the name of any of his sons.

Q. Do you remember the name of his eldest son?

COURT: The Doctor has answered he does not know the names of any of the sons.

A. I used to see a very big man, with dark complexion, at the house.

33 Q. Do you know that one of the contestants, William Notley, has been for years confined on the island of Molokai with leprosy?

A. Yes, I know that.

Q. In the intercourse between Mr. Notley and his wife you never saw any signs, did you, of any animosity or estrangement between them?

A. Not at all.

Q. None whatever?

A. No.

Mr. STANLEY: That is all.

Mr. CECIL BROWN called and sworn.

WITNESS: I hold here the last will and testament of Charles Notley the elder, which was drawn by me under instructions received from Mr. Notley in the month of May, 1899. When he came to my office my recollection is, though I am not very clear on that subject, that he brought a previous will that had been drawn by Judge Hartley, and this will now presented was drawn, and I think the only

difference between the will that he gave me which was drawn by Judge Hartley and this was the provision whereby all the income of the one sixth that had under the previous will been given to his son Charles was given to the children of Charles Notley Jr. instead of to their father, who was Charles Notley Jr., and the will was drawn; I think he took it away with him; and he came back to the office and it was executed at my office on the day of the date herein mentioned. I drafted it first, read it over to him, and had it typewritten; on the eighteenth day of May he signed evry page of it and it was witnessed by myself and Fernandez and Mackintosh.

COURT: In his presence?

WITNESS: He signed the will in the presence of every one of us, and then we, at his request, signed the will in his presence and in the presence of each other, and he at that time declared it to be his last will and testament. After its execution I put it in an
34 envelope and he delivered it to me. I have had that written will in my possession from that time until after Mr. Notley's death, and on the day after his funeral, I think it was, or a couple of days after his funeral, I notified all the heirs at law, Mrs. Notley, Charles Notley, Mrs. Hughes, David Notley, William I could not because he is a leper on the island of Molokai, and they came to my office and I read it over with the codicils. In regard to the first codicil, my recollection is that I received a letter from Mr. Notley from Hamakua, requesting me to draw up a codicil and put myself as executor and trustee in the place of Thomas Rain Walker. Mr. Notley had been in Honolulu previously to this and asked me if I had any objections to serving as a trustee and executor with Mr. Lidgate. I told him I had none whatever. He went back home and afterwards wrote me, and I prepared this codicil in the office and sent it up to him at Paauilo, and the next thing I knew I received it through the mail and attached it to the will. Whether I sent the will up before it was attached is a matter I can not recollect now. The first codicil was returned to me, and I do not know whether I sent the first codicil and the will together to Mr. Notley then; I don't recollect whether I did or not. During his last illness, after he came down from Hawaii in this year, he came to my office, he had been coming in there every day when he was down town, and if he had any drafts or any money he had come from Hamakua down here, he generally brought them to me, and I put them in bank or gave him credit on my books, as he wished. He used to draw money from me in Honolulu, and had money in the bank. Before the last codicil was made he came down to the office and told me he wanted to make a change in his will. I asked him what it
35 was, and he told me he had been thinking the matter over and had come to the conclusion that the homestead at Paauilo should be given to his niece Emma Danforth, and he asked me and instructed me to draw up a codicil to that effect taking it away from his son David. He told me that he wanted it so fixed that the cottage and the furniture and whatever his wife had used during his lifetime should be secured to her for the term of her nat-

ural life; and after receiving these instructions I drew up this codicil.

COURT: What date?

A. Eleventh of April, 1902; "Providing, however, that it is my wish that my wife," etc. He had been suffering if he took much exercise walking or driving, and I said "Mr. Notley, if you prefer, after I have drawn this will I will bring it up to the house, to Mrs. Danforth's house," and he said he would be obliged if I would, for every time he walked around he got those fits of coughing and spitting blood. I drafted the codicil, had it typewritten, and with my clerk, Mr. Fernandez, I went to the house on the 11th of May, 1902,——

Mr. MCCLANAHAN: May or April?

A. Eleventh of April. We went there, and he was sitting on the veranda, which had curtains on it, fronting the street. He was sitting there on a chair. I walked up with the boy, spoke to him, and he asked if the document was ready. I said yes, took it, and read it to him. I asked him if he was ready to sign it. He said yes, called Mrs. Danforth, I think, and asked her to bring pen and ink and some blotting paper. Mrs. Danforth brought it, or at least sent it out by the servant, I forget which, and thereupon he signed it in my presence and in the presence of my clerk Mr. Fernandez and
we each signed it in the presence of each other, and I took it
36 away and had it in my possession ever since until I sent it up by registered letter to the clerk of this court for probate. When we went up there to Mr. Notley to execute that the codicil was affixed to the will, but the execution was done up there in the building. Previous to making this execution he had asked me for the will and broken the seal of the original envelope in which it was and read it there in the office and afterwards gave me the instructions to make the codicil. I put it in a new envelope and after I came back after the execution I kept it among my papers until after his death, when it was opened and read in the presence of the family; Mr. Stanley was present representing his client. I sent it up to the Clerk of the Court for probate. This is the document I drew up.

COURT: The document is offered for probate.

WITNESS: The document is offered for probate. I know one thing: After the will was made, Mr. Notley and I were talking about his will, one day there in my office. I had said that one of the chief objections to becoming executors and trustees of people who were well fixed was the difficulty of getting people to go one one's bond, their inability or backwardness to give it, I did not like to ask people to go on my bond. I had forgotten at that time I was made an executor and trustee of this will without bond. He said, "You recall, there is no such provision in my will." I had forgotten that it was provided in his will that the executors and trustees should not be required to give bond. He immediately said, "That is not the case with my will." The will was executed by Mr. Notley, as I said before, in my office the 18th day of May, 1899, and every one of the
pages was signed by him, and it was witnessed by myself, my
37 nephew Alexander Mackintosh, and Frank Fernandez, a clerk in my office then and now. The second codicil was witnessed

by myself and my clerk Mr. Fernandez, and was signed by Mr. Notley in our presence and the presence of each other. Here is the document, will and codicils.

Mr. McCLANAHAN: Is that all?

A. That is all at present.

Q. Do you remember Mr. Notley's ever advising with you in reference to the disposition of his property?

A. No, I can not say that he did. My recollection is that the first bill he brought me had been drawn by Judge Hartley.

Q. Was he a man that would have listened to advice from you or any one?

A. I know he has in some cases listened to me, and in some cases he did not. I advised him against going to law, and he insisted upon it.

Q. And got his money's worth?

A. No, he did not. He paid the lawyers; they got the money.

Q. So you have never advised him in regard to the disposition of his property?

A. No; he told me what he wanted done, and I followed his instructions.

Q. This will that you say was brought to you was the basis for the will which you now present for probate?

A. That is my recollection.

COURT: That is the one you offer for probate?

A. Yes, I offer it for probate.

COURT: It is offered for probate and marked Exhibit A.

McCLANAHAN: The phraseology of the will offered for probate is yours, is it not?

A. I think so.

Q. You are in the habit of writing out in longhand your documents?

A. That is what I generally do. I write them out myself and hand them over to the clerk to typewrite.

Q. Will you tell me how it was Emma Danforth knew
38 she was a beneficiary under this will; you say Mr. Stanley was representing her when the will was opened?

A. I think I told Stanley myself.

Q. You never heard Mr. Notley discuss the disposition of his property before Emma Danforth, did you?

A. No; I never spoke to Mrs. Danforth or knew her until, I think, the day I went up, may be a week or two before, I went up with this codicil, and one Sunday afternoon I met her driving with Mr. Notley in the park; I knew who she was.

Q. Did you stop them at that time in the park and meet her then?

A. Yes, I walked up to them.

Q. Who was in the buggy?

A. Mrs. Danforth and Mr. Notley.

Q. When was this?

A. That must have been in the latter part of March or beginning of April.

Q. Was Mrs. Notley, Sr., in Honolulu at the time?
A. I do not know.
Q. Did you see Mrs. Notley the day the second codicil was signed?
A. No, I did not see her.
Q. You saw Mrs. Danforth, did you?
A. I think Mr. Notley called her for pen and ink.
Q. What did he say?
A. Emma.
Q. Prior to that time, before meeting them in the park, you had never met Mrs. Danforth?
A. I knew who she was, she used to visit my sister's house, but I had never met her.
Q. When Mr. Notley presented to you this second codicil, or the idea or frame for it, did you discuss the matter with him?
A. I did not. He told me what he wanted done, and I did it. The property was his and I thought he knew what he was doing.
Q. He told you he wanted to give the homestead with the furnishings to Emma Danforth instead of to David, his son?
A. He did.
39 Q. But to reserve the cottage that his wife had always occupied. That you did not put in the codicil, did you? He said his house but you did not describe in the codicil that it was the cottage which she always occupied?
A. No, he told me that, but I did not think it necessary to mention it in the will as he told me she had always occupied it. There is one matter I want to say; one of the witnesses to the first codicil is out of the country. He called upon me the day he was leaving for San Francisco.
Q. How long have you known Mr. Notley?
A. Since 1875.
Q. Do you know any of his family?
A. I know them all, but William has been so long away, on Molokai, that I do not know whether I would recognize him or not.
Q. Who was Mr. Notley's business adviser?
A. I think I did all his business in Honolulu, outside of Davies.
Q. He never discussed with you the disposition of his property?
A. Nothing more than you see in that will.
Q. Did he ever discuss with you his family affairs?
A. Yes, on several occasions.
Q. You have a recollection of these discussions, have you?
A. I have, and in particular in connection with that change in the will where his income was taken away from his son Charles.
Q. Will you please tell us about that?
A. He said the reason he wanted to do it was that he had given every one of his children, when the first dividend was realized from Paauilo mill, $5,000, and the only one who took any care of it was David; the rest of them squandered all their money. This was when Charley was made Collector of the Port of Hilo.
Q. Are you giving the conversation now?
A. I am. When Charley was Collector of the Port his
40 father had to pay $7,000 to save the boy from going to jail, and that was all he was going to give him. He put the money

there so the income should accumulate until the children were of age.

Q. Did he tell you why he was taking the income away from his son and giving it to Mrs. Danforth?

A. He never said a word about that.

Q. Never said anything to you about Emma Danforth?

A. Only that she was like his own daughter and he was going to treat her as one of his own children.

Q. When did he tell you that?

A. When I drew the first will, in 1899.

Q. Can you remember any other conversations relative to his family troubles?

A. There are matters I do not very much like to say. He blamed Charley for some trouble, the eldest boy.

Q. Trouble with whom, and what?

A. He said trouble between himself and his wife.

Q. Will you refresh your mind and tell us what you can of conversations relative to the family differences?

A. He told me that Charley was down here writing letters to his mother——

Q. Down here in Hilo?

A. No, in Honolulu, after Charley got in trouble here with embezzlement; his father then turned him out and would have nothing further to do with him. Charley went down to Honolulu and was continually writing up to his mother and making trouble.

Q. Where did Notley tell you this?

A. In my office.

Q. When was that day?

A. I think it was about the latter part of 1890 or 1891. Mrs. Hughes was living out on Beretania street.

Q. Where was Mrs. Danforth at that time?

A. She was on Kinau street, I think; no, I think she was down at Kauai in 1900, I meant 1900.

41 Q. Did Mr. Notley tell you in what way Charley was making trouble?

A. That he was writing letters and stuffing his mother's head full of damned nonsense.

Q. Did he mention Mrs. Danforth's name?

A. There was a time he mentioned Mrs. Danforth's name, when some people came to call, his wife came there and made it very unpleasant for some ladies who came there to call.

Q. Then you- mind is not clear as to any of those conversations?

A. It is clear as to what I have stated.

Q. Is that all you can tell as to conversations about family troubles?

A. Well, he has talked time and time again about Charley. To use a common expression, he had no use for Charley.

Q. You have not either, have you?

A. Well, I think there could be a heap of improvement in him.

Q. Do you know if the old gentleman ever made any present to Emma Danforth?

A. Yes, he bought her a house and lot for a wedding present.

Q. Where he died?

A. Yes; he said, so when he came down here he could have a place to go to.

Q. Did not he have a place to go to?

A. He did not at times, at other times he did. Tom Hughes as a rule lived out of town. When Mrs. Hughes had a house there Mr. Notley used to go there.

Q. Then he had a place to go to, did he not?

A. Yes, when she was in Honolulu.

Q. Was Charley not there?

A. Yes, but Mr. Notley did not want anything to do with him.

Q. So he bought this house and lot for Emma Danforth so he might have a place to go to?

A. That is the reason he gave me.

42 Q. Do you know what he paid for the place?

A. Five thousand dollars. I bought it for him.

Q. Do you know of any other presents he made Emma Danforth?

A. I do not know of any other.

Q. Did he make one when her child was born?

A. I do not know.

Q. Did he not pin a check for one thousand dollars on the child's dress?

A. That is news to me.

Q. Do you know about bringing down horses and carriages here from his estate to the Danforth place?

A. Yes, they came down.

Q. Could you say you know that the carriages and horses came down?

A. Yes.

Q. Do you know of anything else that was sent for?

A. No, I do not; he told me he was going to send for his team.

Q. How long has this friendship between Mr. Notley and Mrs. Danforth existed, to your knowledge?

A. I know from what he spoke of her to me, and before that it was common talk both in Hamakua and in Honolulu, he brought her out from England. He had not been home since he left there. He told me about going into a place and asking for his brother, and said he sat there talking with his brother half the night before he told him who he was.

Q. Did you understand that this trouble between the Notleys was caused by Emma Danforth?

A. I do not know anything of that kind.

Q. What was the trouble between himself and his son Charles caused by?

A. Mr. Notley said because Charley stole the money and he had to pay for it; it hurt his reputation and hurt his father; he told me that was all he had against him.

Q. You have spoken of letters which Charley Notley was writing to his mother which caused trouble; what was the subject of

43 those letters?

A. He did not tell me the subject of the letters; he said

Charley was writing to his mother and had complete influence over her and she would do whatever she wanted.

Q. Did he not speak to you at that time of Emma Danforth?

A. He never told me anything about Emma Danforth but that she was his niece, he had brought her out from England and he was going to look after her.

Mr. McClanahan: That is all.

Mr. Stanley: You stated that old Mr. Notley spoke of having his reputation hurt by the loss of the money. Do you know whether or not Mr. Notley resigned from the Constitutional Convention on that account?

A. I know that he resigned.

Q. You do not know whether or not on that account?

A. That is one of the reasons he told me, and further that he had made him sick. He was not well.

Q. You spoke, Mr. Brown, of the present of the house and lot to Emma Danforth on her marriage?

A. I think it was on her marriage, or afterwards, I don't know.

Q. Do you know whether or not it was a matter of fact she shared in the present Mr. Notley gave to all his children when the first dividend was paid from the plantation?

A. She did.

Q. Do you know whether the house and lot were bought with that five thousand dollars?

A. I do not know about that. I fixed the deed up for Mr. Notley. Whether they were bought from this five thousand dollars I do not know about that.

Q. At the time of making that present Mr. Notley treated her equally with his children?

A. That is what he told me.

Q. You spoke of horses and carriages being brought down
44 from Paauilo to Honolulu. Did he tell you why?

A. Because it cost so much money for hack hire.

Q. Did he tell you of trouble with hack stand No. 32?

A. I do not recollect that. He told me he had asked to have the horses and carriages sent down.

Q. Do you know whether the carriage was sent down?

A. Only that Mr. Notley told me the carriage had arrived.

Q. Would it not be news to you to hear that the carriage and horses had not arrived?

A. It would be. I understood they had arrived.

Q. Have you any recollection as to the year when first Mr. Notley brought Emma Danforth to the country?

A. I think that was after his first visit.

Q. Was it about the year 1883 or 1884?

A. About that time, I should say.

Q. Eighteen or nineteen years ago?

A. Oh, pretty nearly twenty years ago.

Q. Mrs. Danforth was at *eht* time she was brought a child?

A. Yes, a child.

Q. Do you know whether Mr. Notley educated and brought her up as a member of the family up to the time of her marriage?

A. He so informed me.

Q. Was Mrs. Danforth present at the time of signing the will dated May 18, 1899?

A. No.

Q. Not present at the execution of the will?

A. I do not know whether she was in Honolulu or not. She was never in my office until after Mr. Notley's death.

Q. Was she present at the execution of the codicil of April 11th?

A. She was not.

Q. What have you to say as to the mental capacity or in-
45 capacity of Mr. Notley at the time of the execution of the will of May 18, 1899?

A. He was perfectly competent to make his last will and testament; thoroughly understood it.

Q. He understood fully the nature of the business he had in hand?

A. He did.

Q. And the disposition he wished to make of his property?

A. He did. I stated in my direct examination that once or twice in his visits to Honolulu he read the will over.

Q. From the time of the execution to the time of his death did he express any dissatisfaction with that will?

A. No, not to me.

Q. What can you say as to his mental capacity or incapacity at the time of the execution of the codicils one and two?

A. When the first codicil was made he was here on Hawaii and I was in Honolulu. He had spoken to me about taking the place of Mr. Walker. I drafted the will and sent it up to him.

Q. What can you say as to his capacity or incapacity for making it?

A. Just as sound as you or I.

Q. No indication of failing intellect?

A. No. At no time during any time I had conversation or business with him. He has always been the same.

Q. Did the illness under which he was suffering appear to affect his mind?

A. Not in the least; only when he walked too much it brought on fits of coughing.

Q. I understand that in none of the conversations with you with reference to his reason for leaving his son Charley out of his will was the name of Emma Danford brought into the discussion?

A. No.

Q. His reasons for acting so towards his son Charley being based as you would gather from his conversation, altogether on his
46 son's misconduct?

A. Yes.

—. That is all.

WITNESS: I would like to state that so far as I know the property, I have in my possession and under my control some seventy odd thousand dollars' worth of mortgages and security consisting of notes,

mortgages and bonds in the Oahu Sugar Co., Bishop & Co. from a statement rendered me in Honolulu have some thirty odd thousand dollars' worth of bonds and security, Messrs. T. H. Davies & Co. have entire possession of the cash belonging to him, over six thousand dollars, he has over eighteen hundred shares, I think, in the Hamakua Mill Co.

COURT: Has he any shares in Honokaa?

A. It is the Hamakua Mill Co. In the petition I said two thousand; it is either eighteen or fifteen hundred.

Mr. LIDGATE: Fifteen hundred.

WITNESS: He owns the Ahupuaa Kuaiku.

Mr. MCCLANAHAN: Is that all, Mr. Brown? I want to ask you one more question.

A. That is all.

Q. Did you ever dissuade Charles Notley from disinheriting his son William?

A. No; I asked him why he was making this change.

Q. His son William—I am talking about William Notley, the leper. Did you ever dissuade him from disinheriting William?

A. Never.

Q. Did he ever tell you he was going to disinherit his son Wiiliam?

A. He never told me that.

COURT: Is that the fact, that he disinherited William?

A. No, he provided for him in his will.

Mr. MCCLANAHAN: Did Charles Notley ever say to you that he wanted to leave his son William Notley out of his will?

47 A. No, he never said anything to me about that.

COURT: What is the estate worth?

A. I should say between 350,000 and $400,000.

Q. Of what does it consist?

A. The only real estate holding is Paauilo, Kuleana, Waipao, Kukaina. The rest is personal property.

COURT: Consisting of what?

A. Notes, mortgages, bonds, shares of stock, fifteen hundred of the Hamakua Mill Co.

COURT: That is all.

J. W. LEONHART called and sworn.

Mr. BROWN: Where do you reside?

A. At Paauilo.

Q. How long?

A. A little over twelve years.

Q. Did you know Mr. Charles Notley the elder?

A. Yes, sir.

Q. How long?

A. All that time I have been acquainted with him.

Q. Were you employed by him?

A. I was employed the first six years as bookkeeper for the Company, and since then I have been employed by the Hamakua Mill Co.

Q. Do you recall Mr. Notley's making a codicil to a will?

A. I recall his making it; I recall his bringing a paper into the office, saying it was a codicil, and asking me to witness it with Mr. Siebecker.

Q. Who is Mr. Siebecker?

A. The engineer in the mill.

Q. Will you look at this document here; is that your signature?

A. It is.

Q. Is that the signature of Mr. Siebecker?

A. I think it is.

Q. Is that the signature of Mr. Notley?

A. I think it is.

Q. Did Mr. Notley sign that codicil in your presence?

A. He did.

Q. And in the presence of Mr. Siebecker?

A. Yes.

Q. You all signed at the same desk?

48 A. Yes. We were sent for to be there.

COURT: You were all three there at the same time in the room?

A. Yes.

Mr. McCLANAHAN: Can you recollect whether or not there was any other document attached to that?

A. I could not; it was folded so I could see nothing but the page to which our signatures were attached.

Q. Did he tell you it was a codicil to his will before requesting you two gentlemen to be witnesses?

A. Yes.

Q. You signed it in the presence of each other?

A. Yes.

Q. That signature is Mr. Siebecker's?

A. Yes.

Q. To the best of your knowledge and belief, is he out of the Territory now?

A. Yes.

Mr. McCLANAHAN: That is all.

Mr. BROWN: What was Mr. Notley's capacity at that time in regard to his mind and general bearing; was he in his usual sound mental condition?

A. He seemed to be.

Q. Was he ever at any time in any other but what you would judge to be sound mental condition?

A. No, I never saw him in any but what I would call sound mental condition. He was always reserved with me.

Mr. BROWN: That is all.

FRANK F. FERNANDES called and sworn.

Mr. BROWN: Where do you reside?

A. In Honolulu.

Q. What is your occupation?

A. Clerk in your office.

Q. Did you know Mr. Notley?

A. Yes.

Q. Do you know whether he made a will?
A. I witnessed it; he said it was his will and testament.
49 Q. Were there other witnesses?
A. Yes, sir; yourself and Mr. Mackintosh.
Q. Will you look at that document and say whether or not that is your signature?
A. It is.
Q. And that is the signature of Mr. Notley on each leaf?
A. Yes.
Q. Did Mr. Notley sign that in your presence?
A. Yes.
Q. Where?
A. In your office.
Q. On the date therein named?
A. Yes.
Q. Did I sign in your presence?
A. Yes.
Q. Did Alexander Mackintosh sign in your presence?
A. Yes.
Q. And did we all sign in the presence of Mr. Notley?
A. Yes.
Q. Did he declare this to be his last will and testament?
A. Yes.
Q. What was his condition so far as you observed on that day?
A. He appeared of sound mind.
Q. Do you recall typewriting this codicil whereby I was substituted in the place of Mr. Walker?
A. Yes.
Q. Did you typewrite that in my office on my machine?
A. Yes.
Q. In regard to the codicil executed on the 11th day of April, 1902, is that Mr. Notley's signature?
A. Yes.
Q. Is that your signature?
A. Yes.
Q. Is that my signature?
A. Yes.
Q. Did Mr. Notley execute that in your presence and did we sign in the presence of each other?
A. Yes.
Q. Where was that?
A. On Kinau street, on the porch.
Q. Where was Mr. Notley sitting when we went there?
A. Outside, on the porch.
Q. Was anybody else present?
A. No one except you.
Q. Was Mrs. Danford present?
A. No.
Q. Was Mrs. Danford present at any time when we were there?
A. Only when Mr. Notley asked for pen and ink and she brought it out.

50 Q. After the execution of this codicil what became of the previous codicil, this and the will?

A. We attached that last codicil to the original will; I remember doing that.

Q. After its execution what became of the will?

A. We sealed it in an envelope and in Mr. Notley's presence, and afterwards put it in the safe.

Q. Were you present when that envelope was opened and the will read before the heirs?

A. Yes.

Q. Do you recall whether or not the first codicil was attached to the will when it was sent up by Mr. Notley?

A. I do not recollect.

Q. You do not recollect?

A. No.

Q. Were you present in the office when Mr. Notley came in and gave me instructions to draw the codicil?

A. Yes, I was there the last time he came to the office.

Q. How soon after this did he die?

A. About a week after, I am not sure, I guess that.

Q. He died the day after I came back from Hawaii, did he?

A. Yes.

Q. Was Mr. Notley often in the office?

A. Yes, very often, two or three times a week.

Mr. McClanahan: Did you hear a conversation between Mr. Notley and Mr. Brown in the office when a second codicil was spoken of?

A. I saw them speaking, but did not know what the conversation was.

Q. Do you know Mrs. Emma Danford?

A. I know her by sight, not to speak to her.

Mr. McClanahan: That is all.

Mr. Brown: That is all.

51 Mr. Anthony Lidgate called and sworn.

Mr. Stanley: You were acquainted with the late Mr. Charles Notley?

A. Yes.

Q. How long have you known him?

A. Since 1878, I think.

Q. How did you become acquainted with him?

A. Well, first became acquainted with him when I was living in Laupahoehoe with my parents. He used to pass through there and stayed over night with them.

Q. Have you ever had any business relations with him?

A. Yes, more or less for the past 15 years.

Q. What was the nature of these business relations?

A. Well, in 1886 I went to the Hamakua plantation as manager and he was at that time one of the large owners in the Company for which I was manager.

Q. Was your acquaintance with him intimate?

A. Naturally, as time went on, becoming a resident there, our business relations being more or less connected, we became very friendly.

Q. Did these friendly relations continue up to the time of his death?

A. Yes.

Q. When did you last see Mr. Notley?

A. In January, before he went to Honolulu.

Q. January of this year?

A. Yes.

Q. During all the time you have known Mr. Notley, from the time of your first acquaintance up to January, what can you say as to his mental capacity or incapacity at any time during this period, to execute a will?

A. I should say he was perfectly competent, to execute a will or any other document.

Q. Of sound mind?

A. Of sound mind.

Q. Did Mr. Notley ever speak to you in reference to your being an executor and trustee under his will?

52 A. He asked me one day whether I would be willing to serve as a trustee under his will. After some hesitation I said I would.

Q. Did you know Mr. Notley had made a will in which you were named as an executor and trustee?

A. No, I never knew that.

Q. Do you know what estate Mr. Notley left?

A. Yes, I am familiar with his business affairs, having acted for him during his absence in England under a power of attorney and also when he went to Honolulu this last time he sent me a power of attorney.

Q. Please tell the court what estate Mr. Notley left?

A. He has his shares in the Hamakua Mill Company, which were fifteen hundred.

Q. What is the par value of those shares?

A. $100. The land of Ahupuaa, Kuaiku, Kuliano, Waipeo, and also the premises on which he resided, and various household effects, vehicles and horses.

COURT: What did his personal estate consist of?

A. I do not quite understand what you would call his personal property. His accounts in Honolulu I had no means of knowing, I had nothing to do with them; he had a bank account and Mr. Brown attended to his affairs in Honolulu.

Mr. STANLEY: Mention has been made of horses and carriages being sent to Honolulu. Do you know anything about that?

A Yes, I received a letter from Mr. Notley requesting me to forward to Honolulu his team of horses, harness, and we were in doubt, from the wording of the letter, whether the surrey was meant or not, and after putting our heads together we concluded that the surrey was not meant. He afterwards wrote us he wanted the surrey, but the roads being bad, we did not send it.

Q. So the surrey did not go to Honolulu?

A. No, the surrey did not go to Honolulu.

53 Mr. BROWN: The homestead there at Paauilo, are you acquainted with that?

A. Yes.

Q. How many buildings are there on the homestead?

A. Well, there are three buildings used as dwelling; in fact, counting the servants' quarters, there are four. There is the old homestead, Mr. Notley's residence, and above that, situated on the eastern side of the tennis court is the cottage which his wife has always occupied.

Q. How long did she occupy that?

A. To the best of my knowledge she has lived in that cottage for 15 years.

Q. That has always been her residence. And th-t is the cottage she has occupied during that 15 years, the cottage mentioned in the will?

A. That is the way I understand it.

Q. You are thoroughly acquainted with the estate of Mr. Notley?

A. The portion that is located in Hamakua; all the business affairs attended to from the Hamakua end I am acquainted with.

Q. What does the estate in the district of Hamakua consist of?

COURT: That has all been answered.

Mr. BROWN: What is the gross rental of the estate?

A. About seven thousand dollars.

Q. That is from the real estate?

A. Yes.

Q. And the rental from the other portions in Honolulu you do not know?

A. No.

Q. Did you have any conversation with Mrs. Notley before she went to Honolulu before her husband's sickness?

A. Yes. Whenever Mr. Notley has gone away he has always asked me to call around and see that his wife and family were provided with whatever they needed, and I have always gone to see them. She was quite worried about his being away ill, and repeately asked me if I had heard from him by letter, and I asked her

54 what her news was, etc. So she became anxious to go to Honolulu and telephoned me to go and see her; I did so and she asked my permission to go to Honolulu. I said it was not my place to give her permission, and if she felt like she wanted to go she ought to go. She said her granddaughter, Charley's daughter, had received a letter from Mrs. Danford, saying she requested or advised them to come to Honolulu, that their grandfather was not as well as he had been.

Q. Do you know when the old lady went down?

A. She went down, I think some time early in April.

Q. You sent the horses down to Mr. Notley at his request?

A. Yes.

Mr. MCCLANAHAN: Did you see the letter that Mrs. Danford wrote to Charley's child?

A. I did not.

Q. Who told you of its contents?

A. Both Mrs. Notley and Keoli Notley.
Q. And you have stated its contents as nearly as you remember?
A. Yes.
Q. Do you know where that letter is?
A. No, I do not. That is—at the present time, do you mean?
Q. Have you known where it was?
A. Never.
Q. Why did you ask me the question "at the present time"?
A. I did not quite understand your question.
Q. Have you the letter which Mr. Notley himself wrote you relative to the carriages and horses, have you that letter?
A. Yes, I have it.
Q. Where is that letter?
A. In my safe, in the letter file box.
Q. Where is your safe?
A. In my office at Paauilo.
Q. I should like to have that letter. You will remember to produce it at the next hearing?
A. Yes, I will remember.
55 Q. You have another letter in which he requested the surrey to be sent?
A. No, the same letter. I can not remember the exact wording, it was rather confusing. He wished me to send down his team of horses and surrey harness. I showed it to John Notley and we concluded he only wanted the horses and harness.
Q. Did Mrs. Danford write any letter to Mrs. Notley herself that you know of?
A. I was not shown any letters.
Q. Were you shown this letter you have been speaking of?
A. No, they stated they had a letter.
Q. Did you know Emma Danford?
A. Yes.
Q. How long have you known her?
A. Since October, 1886.
Q. Where did Mrs. Charles Notley live prior to living in this little cottage in the yard, did she live with her husband in the same house?
A. Ever since I have been there she has lived in this cottage, or this cottage has been known as her cottage.
Q. Now, which do you mean—that it was known as her cottage, or that she lived there?
A. Well, both. I have frequently seen her there; it seemed to be her quarters.
Q. Where did she sleep?
A. I do not know where she slept.
Q. Prior to her connection with this cottage, do you know where she lived?
A. No, I do not; I was not there prior to the date I have stated.
Q. Who occupied the house on the homestead premises?
A. Mr. Notley and his family.
Q. What part of his family?

A. When I first went there his son Charley was living with him and they occupied the old homestead, Charley's wife and family.

Q. And the mother occupied the cottage?

A. Yes, the cottage was there and as I recollect it that was her cottage.

56 Q. I am speaking now about the occupancy of houses. You say the father occupied the homestead with Charley and his family, and I ask you if the mother at that time occupied the cottage?

A. To the best of my recollection she did.

Q. Who else of the Notley family occupied the homestead?

A. Miss Mullinger lived there—Mrs. Emma Danford.

Q. Is that where she always lived in Hamakua, or was there a cottage for her?

A. No, she lived in the homestead.

Q. The old lady always occupied the cottage, as far as you know?

A. As far as I know.

Q. Do you know the relationship existing between Mr. and Mrs. Notley during these 18 years, were they happy together?

A. To the best of my knowledge they were.

Q. You have some knowledge on the subject, have you not, you have occasion to know something of their family matters?

A. Well, only in the way that I have mentioned, from casuali calling in there and attending to his affairs when he was away, ha ing more or less connection with them there.

Q. I imagine from the statement you made that *w*he asked your permission to go to Honolulu that you are well acquainted.

A. Well, the natives look upon one left as I was, to pay bills and see they had what they needed, etc., as a kind of father.

Q. You had then occasion to know of the family life, d you not?

A. Well, only in that way.

Q. Did you know anything about the relationship of Emma Danford to the Notley family?

A. Yes, I knew that there was a certain amount of jealousy, the Notley family were somewhat jealous of Miss Mullinger.

Q. Whom do you mean by the Notley family?

A. The old lady, Mrs. Notley, Sr., and the children.

57 Q. And the old lady and children were jealous of Mrs. Danford?

A. To a certain extent, yes.

Q. What do you know of Mrs. Danford's jealousy of the Notley family, anything?

A. No, I have never heard of anything to lead me to believe she was jealous of them.

Q. The feeling, if there was any, between Mrs. Notley and Mrs. Danford, was all on the side of Mrs. Notley, do I understand you to say that?

A. The only things I have ever heard came from that side. I never heard Mrs. Danford say anything to show there was any ill feeling or make any ill-natured remarks about the Notley family, but I have heard the native portion of the family make remarks about her.

Q. What did they say?
A. Well, it would be hard for me to recall just what.
Q. There was ill feeling between the Notley side and Miss Mullinger, was there?
A. At times.
Q. And you have known that to exist ever since you have been acquainted with the Notley family?
A. The first two or three years I was there I did not become intimately acquainted or know much of them, but afterwards, as she grew up and I came to know them all better there was certainly a feeling of jealousy on the part of the native portion of the family against Miss Mullinger.
Q. Did you know of any cause for that feeling?
A. No other but what I would surmise.
Q. Miss Mullinger was at the house a great deal, was she?
A. She lived there.
Q. She was not welcome there from the Notley side?
A. I presume not.
Q. Do not you know she was not welcome?
A. At times it seemed to me that everything was agree-
58 able, but other times there seemed to be trouble.
Q. How did Mr. Notley view this trouble between his family and Miss Mullinger?
A. He never said anything to me about it. Mr. Notley was not a man who talked of his private affairs, to me, at least.
Q. Do you know how it happened that Miss Mullinger was at the Notley homestead so much of the time?
A. She was brought out from England by Mr. Notley when she was a child.
COURT: How old was she then?
A. I should not think over 13 or 14 when I fi-st saw her.
Q. How long had she been there then?
A. I think about two years. He brought her from England as a child and I understood he had partially adopted her or was to adopt her.
Q. Whom did you understand this from?
A. That was the talk when I came there.
Q. Did she tell you so?
A. No.
Q. Who did?
A. I can not tell you who did.
Q. Did you ever have any talk with Miss Mullinger about this disagreement between herself and the Notleys?
A. No.
Q. Have you had talks with the Notleys about it?
A. Well, not of my seeking.
Q. What was the nature of those complaints, why were they complaining about Miss Mullinger?
A. Young Charley is the only one who has ever said anything to me directly.
Q. Has not Mrs. Notley?

A. Only indirectly.

Q. Well, tell us what she said indirectly.

A. When Mr. Notley was ill, before his death, I think it was in December, I visited him every day, and I saw that he was gradually getting worse, and I talked with the doctor, and he
59 was living there with only Japanese servants to wait on him——

Q. What doctor was that?

A. Dr. Irwin. He was living there alone, it seemed to me he was not having the proper care, there was no one to make him the little dishes he needed, and I wrote down to Mrs. Danford saying the old gentleman was not at all well, and I said I heard they were coming up or thinking of coming up, and urged them to come up. Mrs. Danford came up the next Kinau and stayed until he was strong enough to go down. He improved as soon he she came there and nursed and cared for him. She took him to Honolulu, and the old lady, Mrs. Notley, was quite bitter that she took him away and she was not allowed to go or did not go, I do not know just how it was, but there was that feeling.

Q. That came from Mrs. Notley herself, you do not know anything but what she told you?

A. That is all.

(Intermission until 1.30 p. m.)

Mr. McClanahan: Where did you learn that Emma Danford was coming to Hamakua, what prompted you to write to them?

A. I had heard some time previous that they intended to visit in Hamakua.

Q. So I understand. Where did you hear that, who from?

A. I can not recollect just now. It was rumored about that she was coming to visit at Hamakua.

Q. What was the feeling and the relationship between Mr. Notley and Emma Danford as you saw it and knew it?

A. Very friendly.

Q. Can you explain it a little more in detail?

A. Well, she lived there with him and she was more or less with him.

60 Q. What did she do in the house, did she take care of things, was she the head of the house, or did she assume to be?

A. Practically, before her marriage.

Q. After her marriage she lived there not so much, did she?

A. No, very little.

Q. But this relationship kept up between them, did it not, after her marriage?

A. Her friendly relations, certainly.

Q. During the time she was in the house was there existing a friendly relation between Mr. Notley and his family, his children especially?

A. Yes, as far as I know, there was.

Q. To the same extent that there was between Mr. Notley and Emma Danford, or did he seem to make more of her than he did of his own children?

Q. There were none of his children there a great part of the time; his grandchildren were there; he took care of his grandchildren and treated them exactly as he treated Miss Mullinger.

Q. Exactly as he treated Miss Mullinger. By the grandchildren do you mean the children of Charley Notley?

A. Yes, two girls.

Q. How did Miss Mullinger and the grandchildren get along? They lived in the same house, did they?

A. Yes.

Q. How did they get along? Was there a friendly relationship between Miss Mullinger and the grandchildren?

A. Miss Mullinger was married and away about the time the grandchildren came there.

Q. When they did visit, how did they get along?

A. They used to be around together driving and around.

Q. Did she seem to be more friendly with them than with the others, the children of the old man, Charley Notley, Maria Hughes, and David?

A. The only occasion upon which David visited his father
61 that I have heard of was after Miss Mullinger was married and away and I was also away myself at the time, at the coast.

Q. You know of no visits made by any of the children when Miss Mullinger was there?

A. No, I can not say I do, with the exception of Charley and his family.

Q. How did Charley and Miss Mullinger get along together?

A. I am sure I can not say; they had very little to do with each other.

Q. There was not the same intimacy between Charley and Miss Mullinger that there was between Charley's children and Miss Mullinger?

A. Probably not, their ages were dissimilar.

Q. Aside from the ages, did you notice any difference in the feeling between them?

A. I had no opportunity to judge, because I do not recollect any occasion when I saw them together.

Q. Charley was there very little of the time, was he?

A. Yes, and when he was there I saw nothing of him.

Q. Was this friendship between Miss Mullinger and the grandchildren noticed by you after she was married?

A. Yes, for the simple fact that before that they were not living there.

Q. Who was living there before she became married?

A. For a number of years she lived there almost alone with her grandfather, or rather her uncle, and at one time she had Miss Barnard living there with her.

Q. Who is Miss Barnard?

A. Sister of Judge Barnard of Laupahoehoe.

Q. Is she one of the devisees under the will?
A. Yes.
Q. Is she a friend of Miss Mullinger's?
A. I presume so, she lived there.
Q. Do you know who asked her there?
A. No, I do not; probably Mr. Notley.
62 Q. Do you know of the friendship or the relationship existing between Mr. Notley and Miss Barnard, do you know anything of that?
A. I know that they were friendly, yes.
Q. Do you know where it had its inception, or how?
A. She lived at a neighbor's house for a number of years and taught the government school, and finally the gentleman at whose house she was living died rather suddenly, and I fancy Mr. Notley thought there was no suitable place there and he invited her to his house.
Q. She and Miss Mullinger were friends, were they?
A. Yes.
Q. And she and Mr. Notley were living there at the time of this supposed invitation to come to Mr. Notley's to stay?
A. Yes.
Q. You can not say it was Miss Mullinger's influence over Mr. Notley that brought Miss Barnard to the house to live?
A. No, I can not say that.
Q. Do you know whether Miss Mullinger while living with Mr. Notley generally had from him what she wanted?
A. I think she did.
Q. He treated her as he would a daughter?
A. Yes.
Q. How long did she live there in the house with Mr. Notley?
A. She lived there from the time she came from England, with a few exceptions at short intervals when she was at school in Honolulu, up to the time of her marriage.
Q. How many years, approximately, would that be?
A. Possibly 11 or 12 years.
Q. Do you remember when Miss Mullinger returned to England with Mr. Notley?
A. Yes.
Q. Do you know the occasion of her going back?
A. I do not, except in a general way, they went for a visit.
Q. You mean both of them?
A. Yes.
Q. Do not you know as a matter of fact that Mr. Notley was taking her back for good?
A. I never heard that.
63 Q. How long were they gone away on this visit?
A. I should say six or eight months.
Q. Who occupied the homestead while they were gone?
A. Mr. Notley's wife.
Q. What Notley, Charley Notley's wife?
A. No, Mrs. Notley Sr.

Q. Any one else of the Notley family?
A. I do not recollect.
Q. You mean that Mrs. Notley moved into the larger homestead premises after Mr. Notley and Miss Mullinger left?
A. I think not, I think she still occupied the cottage and looked after the premises.
Q. Then the larger premises were not occupied at all?
A. No, I recollect now that papering and painting were going on then.
Q. Who directed the papering and painting of the house?
A. It was partially completed when he went away and he left me to see that it was finished.
Q. Did you know that Miss Mullinger was coming back?
A. Well, I never heard otherwise.
Q. Did you yourself ever hear of any disputes between Miss Mullinger and the Notley family?
A. Never.
Q. All that you know of any feeling between them came from what the Notleys said to you?
A. Yes, that is, the native, not Mr. Notley Sr., he never said anything to me, but the native side of the family did.
Q. Have you stated what their reason for this feeling was?
A. I think I said it was jealousy.
Q. Brought about by the extreme friendliness of Mr. Notley and Miss Mullinger?
A. Well, evidently from her being there they were jealous of her.
Q. Did they not complain to you that he was under the
64 influence of Miss Mullinger and that they were not treated as they were before she came?
A. No, I think not.
Q. Well, what was their complaint then? Jealousy is a very general term; why were they jealous?
A. Oh, slighting remarks about Miss Mullinger they made to me from time to time and called her stuck-up.
Q. She was stuck-up?
A. That is one of their expressions.
Q. Did they convey the idea to you that she looked down upon them, did not recognize them as her equals?
A. Well, if that term conveys that idea; that is what they said to me.
Q. Well, do not you know what they meant when they said that?
A. I had a desire always to get away and not talk the matter over with them. I had as little to say as possible.
Q. Do not you know what they *meant* when they said she was stuck-up?
A. I presume they meant what the word conveys.
Q. That she was above them and looked down on them?
A. Well, I do not wish to put a meaning on the term. That is what they said to me. You asked me what they said, and that is what they said.
Q. They having said that, what did you say?

A. I had no desire to mix up with any family quarrels. It was only young Charley, he was the one that talked to me, and from time to time the old lady, Mrs. Notley Sr., had made remarks about Miss Mullinger; those were the only ones.

Q. Those were the only ones you saw?

A. No, I saw Mrs. Hughes from time to time.

Q. Did she share in this jealous feeling?

A. She never said anything about it to me.

Q. Have you been at the Notley residence when Miss Mullinger was there, and taken a meal, dined with the family?

A. No, I do not think I ever dined, ever had a meal at
65 Mr. Notley's house.

Q. Do you know whether Mrs. Notley dined with her husband or not?

A. I think not. I have seen her eating in her cottage.

Q. Miss Mullinger dined with him, did she not?

A. Yes, I know that by having called there when they were at meals.

Q. And when Miss Barnard was there she dined with him?

A. Yes.

Q. Did you ever see any of his own children dining with him?

A. Yes, young Charley used to take his meals with him. The girls, Charley's daughters, lived in the house, and the eldest daughter acted as Miss Mullinger did when she lived with her uncle, directed the house.

Q. Mr. Notley's feeling towards his grandchildren, the children of Charley, was friendly, was it not?

A. Yes; he certainly did enough for them.

Q. You are certain it was friendly?

A. Yes, I am sure the only education they had was paid for by him.

Q. Do you know of any trouble between Charley Notley and his father prior to Charley Notley Jr. residing here in Hilo as custom house officer?

A. No, prior to that time his father always spoke in the highest terms of "my boy Charley." "My boy Charley" was well educated, good at figures, a high chief, a cousin of Sam Parker's; he was the apple of his father's eye.

Q. When was that?

A. That was prior to being custom house officer.

Q. When was that?

A. I think that was four years ago when he got into trouble here, perhaps longer than that.

COURT: It was in 1893 or 1894, was it not?

A. It was during the time when his father was in the
66 legislature, in 1895. His father told me, the only time he ever talked about his boy Charley, he came down and rode out to the plantation with me and confided to me he had just paid James Castle a check for $5,000 to keep Charley out of jail. He talked very bitterly about it, and after that he never talked about

him nor seemed to want to have him around or anything to do with him. He resigned from the legislature on that account, he told me.

Q. After 1895, did you see Charley about the homestead?

A. Yes, after he got out of this position here he moved out there and lived there; he shared the cottage with his mother.

Q. And ate there?

A. I think he did eat with his mother.

Q. And Miss Mullinger lived in the house?

A. Miss Mullinger was then married.

Q. What did Charley Notley do before he took this Government position?

A. I think he had a position on the water works in Honolulu.

Q. Was he not connected at one time with the Hamakua plantation?

A. I think he had charge of the plough engines for nearly a year, and then resigned.

Q. What did he do after that.

A. I think he wished to become a surveyor and left Paauilo and went to Honolulu and got into the Survey Department.

Q. Did you see any change in the father's feeling toward Charley Notley after he helped him out of this difficulty?

A. Yes, there was a decided change.

Q. Was there a change, I mean now the other way, after that, did he always retain this bitter feeling towards his son?

A. I never talked with him about his son except that one time. He was quite against him then, but I noticed from the way he was treated after that.

67 Q. How long has William Notley been a leper?

A. I could not say. I know when he went to Molokai, but how long he was a leper prior to that I do not know. He was a leper when I went there, known to be a leper in 1886, and a year or two after he was taken away to Molokai.

Mr. McCLANAHAN: That is all.

Mr. STANLEY: Before he was taken away to Molokai was he generally seen in public, or was he secluded?

A. He was around and about.

Q. Do you know on what premises he lived?

A. He had a cottage of his own, called William's cottage.

Q. In response to Mr. McClanahan's question as to whether or not the old man Notley's feeling towards Charley continued subsequent to the date of his conversation with you, you say you noticed it from his subsequent treatment. What treatment did you notice?

A. Well, the fact that he did not live in the house and eat with his father and did not use his father's horses, and his father never mentioned him or said anything about his boy Charley.

Q. Did he pay his bills?

A. No. I wish he had.

Q. You wish he had. By his conduct he showed that he did not wish to have anything further to do with him?

A. It seemed that way to me.

Q. But up to the time Mr. Notley was called upon to pay this check for him you say he was the apple of the old man's eye?

A. He was the one he always talked of.

Q. Nothing to show prior to that time that any undue influence had been exerted to deprive Charley of his father's affection?

A. Nothing that I know of.

Q. As far as you know, up to that time he held his father's affection?

A. I think so.

68 Q. Is it not a fact, Mr. Lidgate, that for some years prior to Mrs. Danford's marriage that none of Mr. Notley's family except the old lady was living on the homestead premises?

A. I think I have stated that here.

Q. Where for those years prior to the marriage was Mrs. Hughes living?

A. She lived part of the time down at the mill, and after that for a number of years she lived at Kohala.

Q. What was the occasion of her living at the mill?

A. Her husband was sugar boiler there.

Q. And the occasion of her living at Kohala?

A. He had a position as sugar boiler there and afterwards as head luna.

Q. And where was David Notley?

A. David Notley was in Honolulu.

Q. What was the occasion of his being in Honolulu?

A. He was working there for a living.

Q. Working there for himself?

A. Yes.

Q. Charley Notley, you say, was employed first in Honolulu in the Survey Department, afterwards in the water works, and then sent up here to Hilo as custom house officer; so that all those children, Charley, David, and Mrs. Hughes, were absent from the homestead for business reasons?

A. Yes.

Q. Do you know whether or not, as a matter of fact, that Miss Mullinger took care of Charley Notley's children some time prior to her marriage, at the homestead?

A. I believe she did, she taught them, had a little school for them.

Q. Do you know whether they had been at school prior to that?

A. They had been in Honolulu prior to that.

Q. Can you say whether or not Charley Notley's children prior to that were being sent by him to a public school in Honolulu?

A. I think they did go to school there.

Q. A public school?

A. I do not know where they were at school.

69 Q. I mean a school where no tuition fees were charged, so their father was at no expense for their education?

A. I do not know that.

Q. Is it not a fact, Mr. Lidgate, that Miss Barnard's position in the Notley household was that of a paid companion to Miss Mullinger?

A. I do not know that, I never heard that.

Q. What can you say as to the relative ages of Miss Barnard and the present Mrs. Danford; was one much older or younger than the other?

A. Miss Barnard is much the older.

Q. Is she a sister of the late Judge Barnard of Laupahoehoe?

A. Yes, of the present Judge Barnard.

COURT: He is the late judge, but he is still living.

Mr. STANLEY: Oh, I thought he was dead. I was confusing him with her uncle, John E. Barnard, clerk of the Supreme Court. Will you state a little more in detail what Charley Notley has had occasion to say to you in regard to Miss Mullinger? You stated that he made use of slighting remarks about her. You have given us one sample; give us another.

A. That is about all I can recollect, remarks that I never loaded my mind with. I got the general impression that he had no use for her.

Q. Can you state when he commenced to talk to you that way?

A. Oh, different times, when I would meet him on the road or at the warehouse, etc.

Q. Were these remarks to you previous to the trouble in Hilo?

A. Yes, previous and after both.

Q. Was there any other occasion before the one you have given on which Mrs. Notley, Sr., spoke slightingly of Mrs. Danford to you, that being when she complained of not being brought down to Honolulu in January of this year?

A. I never had any conversation with her of a general
70 nature except about business matters, paying her bills or giving her money, or matters of that sort.

Q. So that the only one of the family who used these slighting remarks of Mrs. Danford was Charley Notley, the son of Mr. Notley, who was disinherited?

A. Yes, and on that one occasion his wife, Mrs. Notley, Sr.

Q. But you say that on no occasion did Mrs. Danford ever speak to you in any such way of any members of the Notley family?

A. No, I never had any conversation with her about any member of the Notley family.

Q. Was there anything unusual in Mr. Notley's treatment of Miss Mullinger? You say he treated her as a daughter; was there anything unusual about it?

A. No, I think not. He was quite strict with her, she had to do just exactly as he said, but he treated her very well.

Q. She came out, you say, as a child of eleven?

A. Quite young.

Q. She looked after his house when the rest of the family were away?

A. Yes.

Q. You state that you saw Mrs. Notley eating in her own cottage. Was she eating in native style?

A. Yes.

Q. What do you mean by that?

A. She was eating on the floor, and passing by the door I looked in and saw her eating by herself quite often.

Q. Where were the rest of the family?

A. Well, I would go down to the house to see Mr. Notley and find him home.

Q. You have seen her; have you seen her on numerous occasions?

A. I have seen her quite frequently.

Q. Did she not in fact live almost exclusively in the Hawaiian style?

A. I think so.

Q. For all the years you have known her?

A. I think so. For one peculiarity, she never would ride
71 in a vehicle. She refused to drive but went in a schooner to Kawaihae.

Q. Was it by her request that she went down in a schooner? You mean the long journey from Paauilo to Kawaihae?

A. Yes, her granddaughter did not wish to go by the schooner, but her grandmother overruled her. She said she had never ridden in a vehicle in her life and was not going to begin now. I never have seen her in a vehicle.

Q. Either when Mrs. Danford was away from Paauilo at school or when she was there?

A. I never have seen her in a vehicle.

Q. Can there be any doubt in your mind that just before old Mrs. Notley went down to Honolulu to see her husband at the end of March or the beginning of April, she and her granddaughter had received a letter from Mrs. Danford suggesting the wisdom of their coming down to see the old man?

A. They both told me so.

Mr. McClanahan: Is there any doubt in your mind that both the old lady and her granddaughter had told you they had received a letter from Mrs. Danford advising them to come to the old man at Honolulu?

A. I went there at their request and on coming to the veranda we sat down, and after sitting down she said "Grandmother wishes very much to go down." She said "Have you had any news of Grandfather?" I said, "Yes, my news is fairly good, he is not any worse." "Well," she said, Mrs. Danford has written me saying that we ought to come down." As we were talking about that the old lady, Mrs. Danford, came in crying and sat down on the floor at my feet and said, "We must go down. We have had a letter from Emma saying he is worse, and we must go down."

Q. You state she sat at your feet?

A. Yes, right down there.

Q. What was the occasion of her doing that?

A. That was the way she always did.

72 Q. She always sat on the floor?

A. Yes, in native style.

Q. Did you ever see anything prior to Mrs. Danford's marriage, anything in the intercourse between Mrs. Danford and Mrs. Notley, suggesting that there was anything other than friendly relations existing between them?

A. No, I never have.

Q. Do you know why it was that when Mr. Notley was so ill you found him attended only by Japanese servants, with no delicacies prepared for him? Why was it that old Mrs. Notley did not attend to him, provide him with what he needed?

A. She did all she knew, but she was not capable of it, of cooking him dishes, cheering him up and talking to him. She did everything she could and when I came out she would follow me out and cry about him.

Q. You think she was incapable of attending to him?

A. She did all she could.

Q. After Mrs. Danford's marriage did Charley Notley's children run the house, just the same as Mrs. Danford did before her marriage?

A. His daughter Keola (?) took Mrs. Danford's place, as far as I could see, she looked after the house.

Q. Entertaining went on as usual?

A. Yes. Mrs. Danford used to attend to the tennis and one thing or another, and Keola went right on with it. They used to have tennis parties once a week. After Mrs. Danford went away and Keola came she continued these tennis parties and entertained Mrs. Notley's guests.

Q. Do you know whether or not Mrs. Danford understands the Hawaiian language?

A. I can not say.

Q. You do not know whether or not she was capable of corresponding with Mrs. Notley?

A. I fancy not in Hawaiian.

Q. Did Mrs. Notley understand English?

A. I think not.

73 Mr. STANLEY: That is all.

Mr. MCCLANAHAN: Did Mrs. Notley Sr. take part in the tennis parties?

A. No, she did not.

Q. Who instituted the tennis party programme, Emma Danford?

A. I fancy so.

Q. And it was continued by the grandchildren after Mrs. Danford left but Mrs. Notley was not a tennis player?

A. No.

Q. When Mrs. Notley was eating native style how were Mr. Notley and Emma Danford eating?

A. They ate in the dining room, at a table.

Q. Do you know how Mr. and Mrs. Notley ate before Mrs. Danford came into the family?

A. No, I do not know, I was not there.

Q. Have you seen a good deal of Mrs. Notley and Miss Mullinger, have you seen them together a good deal?

A. Yes, I used to see them together. It used to be their custom to take a morning ride, and I used to see them on their morning rides.

Q. You have stated that Miss Mullinger had to do as Mr. Notley said. Will you give us an illustration of that statement?

A. He was very strict. If he said that any one had to do so and so, he saw that they did it.

Q. Give us an illustration as to Miss Mullinger?

A. I have heard him correct her quite sharply for not having done something, and sent her to do it.

Q. Can you recall any particular instance?

A. No, not any particular instance, but I can recollect his correcting her and speaking sharply to her on many occasions.

Q. How long ago?

A. Prior to her marriage.

Q. And you can not think of any particular instance of his correcting her?

A. I know that tone of voice in which he said "Emma!" and any one knowing Mr. Notley would never forget it.

74 Q. Did he use that tone of voice to others besides Emma?

A. Well, in correcting any one he used that tone.

Q. So that tone of voice was nothing unusual?

A. Only as it bears out the statement I made that w*h*e had to obey what commands he laid down.

Q. So that statement would apply to any one he had authority over; it was not peculiar to Emma Danford?

A. No.

Mr. McCLANAHAN: That is all

Mr. BROWN: I would like to put it on the record that the evidence given by Mr. Leonhart in this case, if necessary, should be used in any further proceedings.

COURT: Do you consent to that?

Mr. McCLANAHAN: I have no objection. The statute provides for that.

COURT: I consent to it.

Mr. BROWN: I ask that temporary letters of administration of this estate be issued to Mr. Lidgate and myself during the period from now until the hearing of the case on the contestant's part, *pendente lite.*

Mr. McCLANAHAN: Under the stipulation as filed we make no objection to the appointment of administrators *pendente lite.* The court will see that the contestants here, with the exception of Charley Notley, are devisees and heirs at law and entitled to the estate whether this contest succeeds or not. I think it proper and right to move that *that* the administrators when appointed shall be directed to pay a suitable sum*e* to these devisees and heirs monthly, and for that purpose I move the court to direct and make an order that the temporary administrators to be appointed by your Honor pay to

75 Mrs. Charles Notley the sum of $250 per month and to each of the heirs $100 a month during the pendency of these proceedings. I am informed that the net income of the estate now, not taking into account the dividends received from this large block of stock, the net income is ten thousand dollars a year. That would make this allowance requested a reasonable one.

BROWN: Including Charles Notley Jr.?

Mr. McCLANAHAN: I don't know about that. It is hardly fair to ask you to recognize Charles Notley.

COURT: What is the necessity for making an allowance to these people? It has not been shown that they need it. If you make an allowance to them they will be less likely to want to finish their case. I am not much inclined to do it. I will give to the widow a necessary allowance, but you are dividing up the estate before you come to it. I don't think I shall grant your motion excepting as regards the widow, or if there is any one who is really in need.

Mr. BROWN: Will counsel on the other side waive the bond? If there is no opposition by counsel on the other side.

Mr. MCCLANAHAN: I waive the question of a bond so far as in my power lies.

COURT: The law requires a bond, as I understand from the statute. It is not a bad plan to follow the statute. Yes, you will have to give a bond, a bond for $20,000, and I appoint Cecil Brown and Anthony Lidgate temporary administrators of the estate of Charles Notley Sr. of Hamakua, Hawaii, lately deceased, and fix their joint and several bond in the sum of twenty thousand dollars. Let them file an inventory within thirty days. I shall make an allowance of $250 a month to the widow and make no allowance to any body else.

76 The allowance to the widow to date from the day of death of her husband.

Mr. BROWN: We have no objection to that whatever.

COURT: Any further allowance to be made? Is that all?

Mr. BROWN: Except the stipulation. We want that passed on.

Mr. MCCLANAHAN: I will waive that requirement for the stipulation, if the court please.

COURT: That portion of the stipulation requiring a proper showing for the appointment of administrator *pendente lite* is waived by the counsel for the contestants and consented to by him in open court. Anything further in the case?

Mr. BROWN: Nothing further. I will prepare the order and bond and submit to the court.

77 I certify that the foregoing is a correct transcript of the evidence in above-entitled cause.

HARRIET GRANGER FRACKER,
Official Stenographer, Fourth Circuit Court.

Endorsed: Number — Division — Circuit Court — Circuit — *In re* Est. of Chas. Notley — 190– —Testimony—Entered in Docket Vol. — Page — Record- Vol. — Page — —— —— Clerk.

78 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Circuit Court of the Fourth Circuit, Territory of Hawaii, January Term, 1903, Robinson J., Presiding.

THURSDAY, *January* 22*nd*, 1903.

In the Matter of the Estate of CHARLES NOTLEY, SR., Deceased.

Petition for Probate of Will.

Cecil Brown Attorney for executors.
Wm. L. Stanley attorney for Mrs. Emma Danford and child.
Kinney & McClanahan att'ys for Contestants.
Judge Little being disqualified Hon. Judge Robinson will preside.
The Order confirming W. S. Wise Guardian *ad litem* is allowed by the Court.

Jury drawn to try the case,

R. McKenzie.	I. E. Ray.
J. A. Humburg.	A. E. Sutton.
A. L. Williams.	E. H. Moses.
Jas. M. Cameron.	H. E. Kelsey.
W. F. J. Dale.	W. F. Borden.
J. E. Gamalieson.	G. A. Stark.

Proponents to have the opening in the case. Exceptions noted by Mr. Kinney, attorney.
Mr. Cecil Brown attorney makes a brief statement of the case to the Jury.
It is stipulated by counsel that Mr. McMahon be appointed stenographer in the case, attorneys on both sides to bear the expense. Mr. McMahon is sworn by the Court.
At 11:10 P. M. Court was adjourned by bailiff E. da Silva until 9 a. m. Friday morning.

FRIDAY, *January* 23*rd*, 1903.

Court was opened pursuant to adjournment. Hon. Judge Robinson on the bench.
9:30 A. M. Jury called all present.
At the suggestion of the Court the Will is read by attorney Cecil Brown.
Witnesses placed under the rule.
12 Noon recess until 1:30 P. M.
1:30 case resumed.
Attorney C. Brown reads the evidence to the jury taken before Judge Little at Chambers when the will was probated.
Cecil Brown for proponent is sworn.
4 P. M. Proponents rest the case.
Attorney Kinney for contestants makes his opening statement to the jury.

4:50 P. M. Samuel Parker is sworn for the contestants.
5:30 P. M. recess until 7:30 P. M. when case was resumed.
Attorney Andrade sworn.
79 Contestants introduce Option from Charles Notley Sr. to Mr. Andrade. Marked Ex. 1.
Mr. Chillingworth sworn for contestants. Mr. Hughes sworn for contestants.
Contestants introduce Letters from Charles Notley to his daughter Mrs. Hughes. Ex. 2.
Letter introduced and marked Ex. 3.
Letter introduced and marked contestants Ex. 4.
Letter introduced and marked Cont'*st* Ex. 5.
Letter introduced and marked Cont's Ex. 6.
Letter introduce- and marked contestants Ex. 7, 8, 9, 10, 11.
10 P. M.Court adjourned for the day to meet Saturday January 24 9 A. M.

SATURDAY, *Jan. 24th*—9 a. m.

Case resumed.
Letters introduced by contestants and Marked Ex. 12, 13, 14, 15, 16, 17, 18, 19.
9:45 Mrs. Emma Notley is sworn for the contestants.
Mrs. Chas. Notley sworn for contestants. Chas. Hitchcock sworn as interpreter in Hawaiian.
5 P. M. Court adjourned for the day to meet Monday morning 9 A. M. Jan. 26th.

MONDAY, *January* 26.

Court was opened pursuant to adjournment present as before.
Jury panel called all present.
Cecil Brown is recalled by counsel for contestants.
Judge Stanley sworn for contestants.
John Carero sworn for contestants.
Contestants introduce photographs M'k'd Ex. 20, 21, 22.
Maria Notley sworn for contestants.
10:45 Recess for ten minutes. Case resumed.
Mrs. Maria Notley in the witness box.
1:30 P. M. Mr. Charles Notley Jr. is sworn for contestants.
5 P. M. recess until 7 P. M.
7 P. M. case resumed. Chas. Notley in the witness box.
Mrs. Hughes is recalled by contestants.
9 P. M. David Notley.
10 P. M. Court adjourned for the day.

JANUARY 27TH—9' a. m.

Mrs. Hughes is recalled by contestants.
Letter introduced by contestants and Marked Ex. 23.
10:40 A. M. Miss Notley sworn for contestants.
12 noon recess until 1:30 P. M. 1:30 case resumed. Miss Notley on witness stand.
John Notley sworn for contestants.
Contestants introduce pck bill lot marked exhibit 24.

4:35 P. M. Contestants close their case.

Motion by attorney Cecil Brown for the proponents that the jury bring in a verdict for proponents. Jury are allowed to retire during the argument. 5 P. M. Jury dismissed until 9 A. M. Wednesday morning.

6 P. M. recess until 7:30 P. M. when attorney Kinney makes his argument to the court. 9:15 P. M. Court adjourned for the day.

WEDNESDAY, *Jan.* 28.

Court opened pursuant to adjournment present as before. Counsel waive the calling the roll of Jurors.

The Court grants the motion of the proponents. Jury render the following verdict: We the jury in the above entitled
80 cause find for the proponents and to the first question of fact submitted to us answer and say that the will and codicil dated respectfully May 18th 1889, August 22nd, 1900, and April 11th 1902 are the last will and codicil of Charles Notley deceased, and in answer to the second question of fact submitted answer, say and find that said will and codicil were not executed by under *on* by virtue of undue influence exercised by Emma Danford at the time of the executing and publishing by the said Charles Notley deceased of said will and codicils thereto.

(Signed) A. E. SUTTON, *Foreman.*

Hilo, Hawaii Territory of Hawaii, January 28th, 1903.

Counsel for contestants notes exception and gives notice of a motion for a new trial.

Court denies the motion for new trial as presented by counsel for contestants 40 days allowed counsel for contestant to prepare his bill of exceptions.

I certify the above to be a true copy of the Minutes in the above cause.

Witness my hand and the Seal of the 4th Circuit Court the 25th day of February A. D. 1903.

[SEAL.] (Signed) DANIEL PORTER, *Clerk.*

Endorsed: Clerk's Minutes.

81 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, January Term, 1903.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Motion for Trial of Issues of Fact by Jury.

By Mary K. Notley, Charles Notley, David Fyfe Notley, Maria Hughes—Née Notley—and William Notley.

Now come Mary W. Notley, widow, & Charles Notley, David Fyfe Notley, Maria Hughes, née Notley, and William Notley, own children of the above decedent Charles Notley and respectfully represent that they, the widow and children, are the sole heirs at law of said decedent and entitled to inherit his entire estate if said decedent is shown to have died intestate; that the estate of decedent and the amount in controversy in this contest exceeds Fifty Thousand Dollars; that contestants deem themselves aggrieved by the decision herein of the Probate Judge at Chambers rendered herein to-wit:

The decision of the Honorable Gilbert F. Little, Judge of the Circuit Court Fourth Judicial Circuit, T. H. dated the 19th of September A. D. 1902.

That these petitioners have appealed from said order and decree to the Circuit Court of the Fourth Judicial Circuit at term time with jury;

That contestants desire and hereby move that the following issues of fact be tried in this Court by a jury.

1st. Are the documents dated respectively May 18, A. D. 1899, August 2nd A. D. 1900 and April 11th A. D. 1902 propounded
82 before the Honorable Gilbert F. Little aforesaid sitting in Probate at Chambers as the last will and testament of Charles Notley, deceased, and codicils thereto (and admitted to probate as such by said Judge by order dated the 19th day of September, A. D. 1902) the last will and testament of the said Charles
W. A. K. Notley deceased & codicils thereto.

2nd. Were said alleged will and codicils thereto executed and published by the said decedent Charles Notley as and for his last will and testament and codicils thereto by under
W. A. K. and by virtue of undue influence exercised by one Emma Danford, residing in the Territory of Hawaii, (a beneficiary and devisee mentioned in said alleged will and codicils thereto) over the said Charles Notley, deceased, at the time of the executing and publishing by the said Charles Notley, deceased, of said alleged will and codicils thereto.

In support of this motion contestants further allege that they have contested before the said Circuit Judge at Chambers the probating of the said alleged will and codicils thereto.

This motion is based upon the records herein and all papers and documents filed in this cause & the affidavit of David F. Notley filed herewith.

(Signed) KINNEY, McCLANAH & BIGELOW & ALEXANDER LINDSAY,
Att'ys for Said Contestants.

Hilo Jan'y 21st A. D. 1903.

83 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, January Term, 1903.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Affidavit of David Fyfe Notley of the Value of the Estate of Charles Notley, Deceased.

TERRITORY OF HAWAII, *Island of Hawaii, ss:*

David Fyfe Notley first being duly sworn deposes and says that he is one of the children of the above decedent Charles Notley; that he has knowledge of the value of the estate left by said decedent and the value of the property now involved in the contest over the alleged will of said decedent and codicils thereto; and that the value of the estate of decedent and the amount in controversy aforesaid exceeds the sum of Fifty Thousand Dollars in other words that the present cash value of the property in controversy as aforesaid exceeds Fifty Thousand Dollars.

(Signed) DAVID FYFE NOTLEY.

Subscribed and sworn to before me this 21st day of January A. D. 1903.

(Signed) W. S. WISE,
[SEAL.] *Notary Public 4th Circuit, T. H.*

Endorsed: Circuit Court 4th Jud'c'l Circ't. In the Matter of the Will of Chas. Notley. Motion for trial of issues of fact. Filed January 22d 1903 Daniel Porter Clerk.

84 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Circuit Court, Fourth Circuit, January Term, 1903.

In the Matter of the Estate of CHARLES NOTLEY, SR., Deceased.

Motion for Trial of Issues of Fact, &c.

The matter coming up for trial of issues of fact by a jury on motion of Mary K. Notley widow Charles Notley, David F. Notley,

Maria Hughes, née Notley and Wm. Notley filed in this Court on 22d day of January 1903 & dated January 21st /03.

It is hereby ordered that said motion, be and the same is hereby granted and that the issues of fact to be tried before said jury are as set forth and designated in said motion hereinbefore referred to.

And it appearing from the record in said cause that I am disqualified to hear and try said issues, the trial thereof is hereby assigned to the Hon. W. J. Robinson one of the Judges of the Circuit Court for the First Circuit for trial and hearing.

Done in open Court at Hilo, this 22d day of January 1903. Said Hon. W. J. Robinson having been requested in accordance with statute to preside in cases of disqualification as aforesaid.

(Signed) GILBERT F. LITTLE, *Judge.*

Hilo, Jan-ry 22nd, 1903.

Endorsed: Circuit Court Fourth Circuit. Territory of Hawaii. In the Matter of the Estate of Charles Notley Sr. deceased. Order on Motion for trial of issues of fact &c &c. Filed January 21 1903. Daniel Porter Clerk.

85 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

(Copy of first twenty pages of official transcript. For remainder see printed copy herein.)

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, Hilo, Hawaii, January Term, 1903.

In the Matter of the Estate of CHARLES NOTLEY, SR., Dec'd.

Appeal from order of Hon G. F. Little sitting at Chambers, in Probate, admitting to probate a document purporting to be the last will and testament of deceased, and directing issuance of letters testamentary thereon.

Before Hon. W. J. Robinson, presiding.

(Hon. G. F. Little, also on the Bench.)

THURSDAY, *Jan'y* 22, 1903—7 p. m.

Mr. KINNEY: May it please the Court, in behalf of the Contestants, I have a motion for the trial of certain issues of fact.

(Mr. Kinney reads motion, and interlines, by leave of the Court by adding the words: Also strikes out, by leave of Court, the word "Judicial.")

Mr. Kinney here suggests that his Honor (Hon. G. F. Little) is disqualified to try the case.

Mr. Kinney here reads order.

Mr. Cecil Brown objects to the use of the words *"pro forma,"* stating: "the admission of the will to probate was formal and not *pro forma.*"

The COURT: Formal, so far as the Probate Court——

The Court here makes an order that case No. 53 on the Civil Calendar (In the Matter of the Estate of Chas. Notley, Sr. Dec'd) be heard by the Hon. J. W. Robinson.

Mr. BROWN: George A. Davis is associated with Mr. Stan-
86 ley and myself as counsel for the proponents.

The COURT: Let the name of George A. Davis be inserted in No. 53 as counsel with Mr. Cecil Brown.

Mr. BROWN: I have been informed there is an appointment of a Guardian *ad litem* of certain minor children in this case. If that appointment was made before the case was assigned to him, I doubt whether or not it was in order. I would like to have an order in this made by your Honor as presiding Justice.

The COURT (Judge Robinson): The order was made by myself.

Mr. KINNEY: Well, simply say that the order is now confirmed.

The COURT: The order heretofore made on the 19th of January to you, Mr. W. S. Wise, as Guardian *ad litem* of the minor children of Charles Notley, Jr., is hereby ratified, approved and confirmed.

Hon. G. F. LITTLE: I hereby resign and give the case to Judge Robinson.

Judge LITTLE: I wish to make further inquiry in reference to a stenographer; I see you have another stenographer here.

Judge ROBINSON: Upon discussing the matter of the stenographer with Judge Little, it was suggested that the stenographer to take down the shorthand notes at the hearing of this appeal be presented in the form of a stipulation, to be filed with the papers in this case, provided that the expenses incident to such stenographer's services shall abide the final determination of this appeal.

The Clerk of the Court here draws the names of twelve jurors to try the case.

Jury sworn by the Court.

Argument between counsel as to who shall open the case.

87 The COURT: I rule that the proponents shall have the opening of the case, at least to the extent of proving the will and codicils referred to, and the facts which you (proponents) have stated are upon them.

Mr. KINNEY: I note an exception, your Honor.

The COURT: Exception allowed.

Examination of jury proceeded with.

Stipulation made between parties regarding appointment of stenographer.

Mr. KINNEY: We will stipulate in open Court in the usual way that the contestants and proponents shall bear equally the expense or that it shall be part of the costs.

Mr. DAVIES: Yes, we will do that.

The COURT: It is stipulated then that the expense of the stenographer shall be at the cost of the parties to this appeal, and that the expenses for such stenographer shall abide the determination of this appeal.

It is further stipulated between counsel that P. M. McMahon shall act as stenographer in the hearing of this appeal.

(Agreed to by the parties.)

P. Maurice McMahon was here sworn by the Clerk, Dan Porter, as official stenographer to report the case.

Continuation of examination of jurors then proceeded with. Recess taken, during examination of jurors, at 11:25 P. M. until tomorrow morning at 9 o'clock. The Court admonishing the jury not to speak of the case to any one or among themselves.

88 FRIDAY, *January* 23, 1903—9 a. m.

Clerk calls the names of the jury. All present.

Examination of jury proceeded with.

Jury sworn to try the case.

Mr. Brown states the case to the jury.

Mr. BROWN: I will now read the evidence taken at both hearings. (Previously had.)

The COURT: Would not the matter come more directly before the jury if the petition for the probate of the will was read.

Mr. BROWN: I will take the suggestion of the Court, and think it is a good one.

Mr. Brown reads petition in the matter of the probate of the will of Charles Notley, deceased.

Also reads will to the jury.

Also, evidence had on the first hearing on the 18th of September, 1902. Reads testimony of Daniel Porter, proving the publication of petition for probate.

Also, reads testimony of Dr. George Herbert.

Witnesses excluded from the Court room by the Court at this point.

Mr. Brown continues reading of testimony.

Recess taken at 12 M. until 1:30 this afternoon.

Jury admonished as previously by the Court.

89 FRIDAY, *January* 23, 1903—1:30 p. m.

Jury all present, as well as counsel.

Mr. Brown continues reading cross examination of Dr. Herbert.

Also reads testimony of Cecil Brown (himself) taken in the case.

Also testimony of J. G. Lenhart.

Also testimony of Frank Fernandez.

Also testimony of Anthony Lidgate.

Mr. BROWN: This is the whole of the evidence taken, direct and cross, on the preliminary hearing, July 1st, 1902.

Mr. BROWN: This is the evidence now of Mr. Lidgate who is recalled. This is the hearing at Hilo, Hawaii, September 19, 1902.

(Reads testimony of Anthony Lidgate.)

Mr. BROWN: I also offer petition for probate of Will, appearance of contestants, proof of publication in the Honolulu Bulletin, a stipulation entered into by counsel that the hearing should be

continued from July to September, a bond of the temporary administrator, inventory, notice of appear, appeal of the contestants from the order of probate, dated Sept. 19, 1902, filed Sept. 20th. The order of probate of the will, admitting the will to probate, and the findings of facts there, dated Hilo Sept. 19, 1902: Gilbert F. Little. Reads that the said will and codicils were duly executed as required by law. Order appointing temporary administrators; also a letter, contestants' Exhibit A., signed by Charles Notley, addressed to Mr. Lidgate; the letter referred to by Mr. Lidgate
90 in the hearing in July, and produced in the hearing in September, testified to as being in Mr. Danford's handwriting, and signed by Mr. Notley.

The COURT: These papers which you now offer are they to be marked alphabetically?

Mr. BROWN: No, I just offer them as probate proceedings, as part of the case.

Mr. BROWN: I offer the will of Charles Notley now in evidence; that I wished to be marked as an Exhibit.

The COURT: What Exhibit.

Mr. BROWN: Exhibit A.

(Will allowed in evidence by the Court, and marked Exhibit A.)

Mr. Brown reads evidence of Cecil Brown, recalled, taken at the hearing in September, 1902.

Also reads testimony of Anthony Lidgate, recalled.

Mr. BROWN: I now ask leave, may it please the Court, that both evidence I have read be received as evidence under the provisions of the Statute.

The COURT: It may be so received.

Recess here taken.

Jury all present. Calling of role waived.

Mr. CECIL BROWN, sworn on behalf of proponents, testified as follows:

By Mr. DAVIES:

Q. Mr. Brown, in your evidence here, in answer to a certain interrogatory, you said when Charley was Collector of the Port his father had to pay seven thousand dollars to save the boy from going to jail, that is all that he was going to give him. Did Mr. Notley tell you that, in a conversation with Mr. Notley?

A. He gave me that information, volunteered it.

91 Q. It was from no question of yours?

A. No.

Q. When did Mr. Notley die?

A. In May last year I think it was, latter part of April or the beginning of May.

Q. How long before he executed the second codicil to this will?

A. Two or three weeks.

Q. Did you know Mr. Notley was coming to your office at the time he came to give you instructions to prepare the second codicil?

A. I had no knowledge of such intention on his part.

Q. Did you know previous to that time that he intended to make and execute a second codicil to the will?

A. I didn't.

Q. How did Mr. Notley appear when he got to your office?

A. He came into the office I think three or four times previously, and took the will, which was sealed in an envelope, he took and read it over and told me to put it back with the other papers in the safe, then he came on this day and told me he wanted to make a change.

Q. How did he look?

A. He was suffering from a very bad cough, the slightest exertion made him cough, otherwise he looked very well.

Q. You knew him intimately for a number of years?

A. Very intimately. I knew that he was down here on account of being ill, under treatment of Dr. Herbert and Humphris at the time for congestion of the lungs.

Q. What would you suppose as to whether or not that man on that day was in full possession of his mental faculties?

A. I am just as positive that he was in full possession
92 of his mental faculties as I am here today.

Q. And you drew that second codicil to the will absolutely in accordance with the old man's instructions?

A. I did it with his instructions, the second codicil; I received my instructions from him.

Q. And acted on those instructions in their entirety?

A. In their entirety. I had no conversation with anybody else but Mr. Notley. Mr. Notley though, gave me more confidence I think than many of my clients do.

Q. Does that codicil contain any suggestion from you?

A. None whatever.

Q. Does the first codicil contain any suggestion from you?

A. Not at all.

Q. You know, sometimes in drawing up a will a lawyer will say something?

A. None whatever.

Q. You have been practicing law for how long?

A. I came back in 1875, after being in a law office in New York City, and after graduating, and from that time on I have been here up to the present.

Q. And handling large sums of money?

A. Yes.

Q. You are one of the trustees of the Campbell Estate?

A. Yes.

Q. As trustee of the Campbell Estate you were entrusted with large sums of money, running into the hundreds of thousands?

A. Yes, it may be.

Q. Now, what do you consider, with reference to the drawing up of a will or codicil, a lawyer's duty as to the making of suggestions.

Mr. KINNEY: I object to that. Mr. Brown said he did not make suggestions.

93 The COURT: Objection sustained.

Mr. DAVIES:

Q. Have you anything else to say as to Mr. Notley's condition on that day.

The COURT: What day do you refer to?

Mr. DAVIES:

Q. As to the execution of the second codicil?

A. As far as I am concerned, I shall testify that he knew what he was doing, and that he executed the codicil of his own free will, and then he requested me to prepare it and I told him——

Q. (Int.) Who was present at the time that he signed the second codicil?

A. Mr. Fernandez. I told Mr. Notley at the time; I noticed that he coughed so much, there was such a strain on him; I said, Mr. Notley if you like I will bring this codicil up to the house where you are staying, and you can execute it there, it will save you from walking around so much; and he thanked me, and said "That is all right, you are a good boy, etc."

Q. Who was present when you executed that second codicil?

A. I, with Frank Fernandez, nobody else; Mrs. Danford wasn't there; the only time I saw her was when she brought some ink. He read the codicil over himself, and I read it over to him.

Q. That was read twice before he executed it, and Mrs. Danford was not present?

A. Was not present, nowhere around.

Q. Upon the occasion Charles Notley, Senior, came to you and instructed you to draft the second codicil, did he come alone?

A. He came by himself.

Cross-examination.

Mr. KINNEY:

Q. As I understand you, Mr. Brown, the original will,
94 when Mr. Notley asked you to make this original will, he brought another will with him?

A. That is my recollection; I have that indistinct idea.

Q. How is it if you were his attorney, Mr. Hartwell was his attorney as well?

A. Before that time I had not much to do with the drawing of the will. Do you remember these suits with the Horners—It was after that, when he left Mr. Hartwell, I did his business. I had been in one dispute regarding T. H. Davies & Co., in regard to the destruction of sugar cane, and he appealed I think to the Supreme Court. Afterwards I advised him not to go in a law suit with the Horners; and Mr. Hartwell was attorney in both those suits.

Q. Was that—well, it was about the time Hartwell was conducting these suits?

A. I cannot remember now the date of these suits; it is impossible for me to say.

Q. Five or ten years before?

A. I cannot tell whether or not it is one, two, three, four, five or six years.

Q. Do you remember whether or not at any other time Mr. Hartwell was acting as attorney for Mr. Notley?

A. I think Mr. Thurston was acting as attorney for Mr. Notley at one time, and I think he told me he went to Thurston in this matter, and he was engaged on the other side, and that is why he went to Hartwell; that was in the Horner suit.

Q. Did you hear of Hartwell acting as attorney for Notley before that occasion?

A. If there was litigation in court I might have known.

Q. Then as a matter of fact, it was Thurston, as you understood from Mr. Notley, who led him to go to Mr. Hartwell?

A. No; he went to Thurston, and Thurston was engaged by the Horners, then he went and got Hartwell.

Q. Then, as a matter of fact, you have no recollection of
95 Charles Notley engaging Mr. Hartwell as his attorney before that date?

A. None whatever.

Q. If that will was drawn, that you say you destroyed in some way, if that will was drawn during the Horner litigation, it would have been after the defalcation of Charles Notley?

A. I don't know; I cannot tell without getting the dates of the suits; I know Mr. Notley was here.

Q. Can you tell what year the defalcation took place?

A. No; I have no recollection of the date; I hear so many things not facts.

Q. Then don't run your memory down—Did Mr. Notley resign from the Constitutional Convention because of this defalcation?

A. I believe that was one of the reasons he had for doing so; I suppose Mr. Notley told me that was one of the reasons that he resigned from the Constitutional Convention; I don't know whether or not it took place before the Constitutional Convention; I don't recollect the date.

Q. Was it in the eightys?

A. I don't recollect whether it was in the eightys or ninetys; I was a member of it.

Q. Don't you know whether that took place in the eighties, nineties or seventies?

A. I know it was under the P. G.'s; I think they came in in 1892 or 1893, the P. G. Government.

Q. And the Constitutional Government took place after that in 1892?

A. That is my recollection, it was in 1892 or 1893; I was one of the last Attorney Generals, but I cannot for the life of me tell what time we got fired out.

Q. That will, destroyed in some way, didn't disinherit Charles Notley?

96 A. My recollection is that the only change was the substitution of Charley Notley's children in his place, but in everything else the will was exactly the same as when brought to me; my

recollection is that Hartwell was the one that drew it; that is my impression.

Q. Coming to the will again: What were Charles Notley's instructions as given to you in respect to this will?

A. He told me that he wanted that will changed so that Charles should not get any money, and that he should have nothing under that, but his children should.

Q. Neither have money, income or the hope of income?

A. His instructions were to me that he wanted his name taken out of the will, and his children's names put in its place, with the same provisions as in the will there.

Q. I ask you to tell me what Charles Notley told you?

A. That is all the instructions I can give you, that the only alteration he wanted in the will was that he wanted it the same with the exception that Charley's children shall be there in his place, and that the income of those children shall be held until they become of age.

Q. I want first to exhaust your memory on the instructions given to you?

A. I am doing the best I can——

Q. Please answer my question—what was to be done with the income?

A. My recollection is that the income was to be held and paid to the children when they became of age.

Q. When they severally became of age?

A. When the girls became eighteen and the boys twenty-one.

Q. Mr. Brown, as Charles Notley put it, in giving you his instructions, were the children to receive income when they came of age?

A. My recollection is that the instructions Mr. Notley gave
97 me were those as are drafted in the will.

Q. That is a lawyer's answer; I want you——

(Int. by Mr. Davies.)

Q. Was that income—Were the children as they came of age to commence to draw income?

A. The will speaks for itself; I cannot say, nor can I recollect every single instruction given me in the drafting of the will. If you give me that will my answer will be to the best of my belief today that the will was drawn exactly according to the instructions Mr. Notley gave me.

Q. You read that will to the jury today, did you?

A. Certainly.

Q. And have read it a number of times. Does that will give the children as you understand it—how does it give the children income?

A. My recollection—I speak from my memory now—my recollection is that the will gives them the interest, and the income when the girls became eighteen and the boys twenty-one.

Q. For instance, if Keala is eighteen years of age, she will commence to draw income whether or not the others have come of age?

A. I cannot recollect that without looking at the will.

Q. How many times have you read the will?

A. May be a hundred times.

Q. Then I ask you on the recollection of the instructions given

you are those children to receive any income independent of each other as they come of age?

A. I can answer that by looking at the will better than from memory; that is, as far as I can recollect it?

Q. What has been your understanding regarding that income?

A. I have really made no study of the will since these proceedings have been instituted.

98 Q. Please answer my question?

A. I have answered it; I have made no study of that, as to what my duties beyond (?) executor or trustee have to be.

Q. Have you any understanding or belief, opinion or dream of what the provisions are regarding this income? Give us your dream?

A. Well, I may have a dream about it.

Mr. DAVIES: I object to this testimony for the construction of this will, and as to what is the meaning and intention of the testator, and the provisions of it, without putting the will in his hands.

(Argument follows between counsel and the Court.)

The COURT: I think that the witness's statement that he had a dream regarding the matter is more facetious than the actual fact. You may proceed Mr. Kinney with your statement.

Mr. KINNEY:

Q. Mr. Brown, I want whatever is in your mind in reference to this question as to the income to the children, as to whether it comes to them—whether it begins and comes to each one as they come of age, or whether none get it until the youngest becomes of age?

Mr. DAVIES: I object on the ground that Mr. Kinney asks what is in Mr. Brown's mind, and it is not evidence; it is not proper on direct or cross examination.

The COURT: Objection sustained to the question as it stands.

Mr. KINNEY:

Q. Give your recollection?

A. My recollection now, as I sit here, is that when the youngest child becomes of age the income then is to go to them; that is, it is not as each one becomes of age, but when they are all of age, including the youngest, that the income is divided. I am not sure of it.

Q. If this will is sustained—that the will and instructions of Charles Notley were that the father or children were to re-

99 ceive neither money or income until the youngest child comes of age?

A. The father certainly not; if they died without children then the heirs should come in.

The COURT: Counsel called your attention as to the instructions given by Mr. Notley.

(Reporter reads last question.)

A. As to my recollection: the father was not to handle a cent; it was given to the children.

Q. Did it suggest itself to your mind that I was raising that point

because I believed the will gave no income until the youngest child came of age?

A. I don't know about that; I didn't gather that from your examination; I thought you were testing my memory.

Q. Is that the usual provision: to accumulate income for the children, leave them without support or money until the youngest child comes of age?

Mr. DAVIES: I object; here is the will, and that is the best evidence.

Reporter reads last question.

Argument between counsel, and court, on the matter.

Mr. Davies finally withdraws objection.

Mr. KINNEY:

Q. I will ask you then, Mr. Brown, whether that is a usual provision for the support and maintenance of children: that they are to get no support or income until the youngest one is of age?

A. I have not seen that that I know.

Q. Have you ever seen it?

A. I do not know but I may have seen it once as I am attorney of this will.

The COURT: Is that of any concern? You state that you have seen it once?

100 A. I may have; I am not certain. I have drawn hundreds of wills, and have drawn a good many deeds, but have not drawn many trust deeds.

Mr. KINNEY:

Q. You have drawn trust provisions in wills?

A. I have had little business in court on trust wills.

Q. Don't you do a great deal of conveyancing?

A. I do a great deal of probate and estate work.

Q. Trust estates?

A. I have been as attorney for executors, etc. I cannot recollect anything honestly. I have some indistinct recollection that there may have been one will where I saw it, but cannot tell.

Q. I am asking you whether or not you can account for a provision of this kind, or where is the motive for a provision of that kind; and you can draw on dreams for your reply?

A. On what?

Q. Why, in explaining a provision that leaves these children without support until this youngest child comes of age; how you can account for it?

A. I can tell you what I think was in my mind at the time: Mr. Notley was taking care of these children himself, paying for their education, and expected to do it, I don't know whether or not he expected to die or not.

Q. I am asking you what element consistent with kindness is there is that provision when a man is making provision for children when he is dead and gone and cannot provide for them?

A. A man can generally do as he likes with his own property;

I would not do it if I had children of my own. That is all I can say, that you would not do it.

Q. Would old Charles Notley do it left to himself?

A. He did it; he has made the provision in the will.

Q. Would he, left to himself, do it?

101 A. I think he would, because whatever he told me and the instructions he gave me, the will was drawn as I recollect according to those instructions.

Q. He was an honest man, wasn't he?

A. As honest as ever walked this earth as I know.

Q. And a warm-hearted, kind-hearted man?

A. I know he had been very kind; I was not so intimately acquainted with him as that; I never visited at his house but once.

Q. Well, you knew Charles Notley, and on your oath before God and man do you believe Charles Notley would make any such provision?

A. Well, he did.

Q. At whose suggestion?

A. I don't know; I know what he told me; whether it came from him or you I don't know; you had better ask him.

Q. Were you ever at Mrs. Danford's in the year 1902?

A. I never was in Mrs. Danford's house until this codicil was signed, never from that day to this, I think the morning of his death; I heard he was dead in the morning and went there; and I don't know whether I saw Mrs. Danford or Mr. Danford, and they told me the body was down to the undertaker's.

Q. Did you ever see the old lady there?

A. Mrs. Notley?

Q. Yes?

A. No.

Q. Are you sure that on the day the homestead was given to——

A. (Int.) She may have been there, but I have no recollection of seeing her there.

Q. How does your recollection on that matter compare with your recollection on the will?

102 A. That is within the last few minutes to my recollection I did not see her.

Q. She was not around when the codicil was being made, was she?

A. To my recollection I did not see her; I cannot tell you whether she was in Honolulu at the time.

Q. Don't you know as a matter of fact she was there?

A. I never knew she was there until about the time Mr. Notley died.

Q. Well, she was not anywhere around when this codicil was read?

A. I never saw her around when this codicil was read to Mr. Notley, and I signed it and the boy at my office signed it as a witness. I never saw Mrs. Notley in her life that I know of or recollect, or spoke to her, until I saw her by her husband's corpse at Williams'.

Q. Have you not heard from—that the old lady was washing the old man's clothes, etc., at the house?

A. I never heard except from Charley, except once or twice

Charley told me his father was ill, and that he thought he ought to have a change of doctors. I never saw Mrs. Hughes but once.

Q. You swear Mr. Notley, when he gave you those instructions, said his son David was a good boy, and was the only one hadn't squandered his property?

A. Yes.

Q. Has this daughter squandered her property?

A. I do not know anything at all about it.

Q. Haven't you said that the girl was a good, hard-working—Mrs. Hughes? Do you remember speaking of Thomas Hughes?

A. I knew she was in town, and that Tommy was boiling sugar I think at Waimanalo.

Q. Then, as a matter of fact, you were simply giving the impressions Charles Notley had when he made this will that all
103 his children squandered hi property except David?

A. Did I so testify?

Q. Didn't you say that he is the only son hadn't squandered his property?

A. When did I say that?

Q. You said it in the record here, and repeated it today?

A. As I recollect, that these were conversations when he told me, these were not declarations that he made to me at the time of the will, or the statements made to me at the time I drew up that will; that is not my recollection; these were conversations I had at different times.

Q. You can then testify that from the lips of Charles Notley?

A. I know Mr. Notley told me David was the only one, in fact he told me he was a miser, and was the only one took care of his money.

Q. He worked on the docks at Honolulu heaving coal?

A. Mr. Notley said he admired him for doing it; and it was Mr. Notley pointed out to me that he drove a street car.

Q. Didn't you know from his father that he was graduate of San Mateo?

A. Never heard of it; I know he drove a tram car and was on the docks; I never saw him there myself.

Q. When did you first know of his being on the docks as a coal heaver?

A. I cannot tell that.

Q. Twenty, fifty, fifty-one?

A. May be five or six years, something like that—those matters never make much impression on my mind.

Q. You testified that Mr. Notley told you that after the Hilo folly, or theft of his son, Charles Notley, that the old man turned him away?

104 A. I said that he had nothing more to do with him. I think Mr. Lidgate said that he left his father's house and went and lived with his mother. I may have said that.

(Mr. Kinney here reads from testimony taken at previous trial of the case.)

Q. Will you refresh your mind and tell us the conversations regarding the family themselves.

"A. He told me Charley was writing to his mother.

"Q. Down here in Hilo, not in Honolulu?

A. (?) After Charley got in trouble for embezzlement his father turned him out and would have nothing further to do with him."

Q. Is it not a fact that the father received him home, and that he lived for three years with his father?

A. I don't know that he lived with his father at all, I was not in Hamakua.

All I stated was what Mr. Notley told me.

Q. But you simply vouch for that, that the old man told you of family matters; he made that statement?

A. I have sworn to it.

Q. Did Mrs. Danford drive the old gentleman to your office occasionally?

A. I think she drove him once or twice he came to draw money.

Q. And this clerk who went to his house and signed the will was your clerk at the time?

A. He had been with me for ten years I think; he came out of school, and has been with me ever since.

Q. And Mrs. Danford saw you and the clerk at the house on the day that the second codicil was made?

A. I don't know if she did or not; I said my recollection was that she came and brought the ink, or the servant brought the
105 ink; my recollection is that he called for her; I do not think that he wanted to conceal anything from her. He then wanted to sign it, and I said "Where is the pen and ink;" and I think he called "Emma," and whether she brought it—the pen and ink came there, but whether she brought it, or the Japanese or servant, I do not know; at least I cannot recollect.

Redirect.

Mr. STANLEY:

Q. You are certain this will was drawn up in accordance with instructions?

Mr. KINNEY: I object to a leading question.

Mr STANLEY:

Q. Can you say whether or not this will was drawn up in accordance with the instructions received by you from Mr. Notley?

A. Why, certainly.

Recross.

Mr. KINNEY:

Q. Is that from memory or the will or what?

A. That will there is according to my knowledge, and my information and my recollection and my belief, drawn up exactly as Mr. Notley directed me to do it, and it speaks for itself. When it comes to taxing my memory about something that happened so

long ago—the will speaks for itself; but when it comes to memory on matters like that, I cannot swear positively as to recollection.

Mr. BROWN: Proponents rest.

(For remainder of stenographer's transcript and for contestants' exhibits 1 to 11 inclusive, 13, 15 to 19 inclusive see printed copy herein.)

106 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Circuit Court of the Fourth Circuit, Territory of Hawaii, U. S. A.

In the Matter of the Estate of CHARLES NOTLEY, Deceased.

To the Hon. W. J. Robinson, being the judge presiding at the trial of the above cause:

Now comes Charles Notley, one of the contestants in the above entitled cause and moves this Hon. court that it issue an order appointing some suitable and proper person to act as the Guardian *ad litem* of John K. Notley, Lily Notley and William K. Notley, minors.

This motion is based upon the records in the case and upon the affidavit of Charles Notley, hereto annexed and made a part hereof.

(Signed) CHARLES NOTLEY,
By His Attorneys, KINNEY, McCLANAHAN & BIGELOW.

HILO, HAWAII, *Terr. of Hawaii, ss:*

Charles Notley, being duley sworn on oath says that he is one of the contestants against the probate of the alleged last will of Charles Notley Sr. deceased. That certain of the beneficiaries named in said alleged last will to wit: John K. Notley, Lily Notley, and William Notley are minor children of this affiant, being of the ages respectively of 20, 17, and 15 years. That their interests in this cause are adverse to those of this affiant and should be protected by the appointment of a Guardian *ad litem*.

(Signed) CHARLES NOTLEY.

107 Subscribed and sworn to before me this 19 day of January 1903.

(Signed) DANIEL PORTER,
[SEAL.] *Clerk of the Circuit Court of the Fourth Circuit.*

Endorsed: Circuit Court Fourth Circuit. In the Estate of Charles Notley, deceased. Motion. Filed January 19th, 1903. Daniel Porter, Clerk.

108 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

In the Matter of the Estate of CHAS. NOTLEY, SR., Deceased.

Mary K. Notley, Chas. Notles, Jr., David F. Notley, Maria Hughes née Notley, Wm. Notley, Contestants.

Order upon reading the petition of Chas. Notley, Jr., one of the contestants herein and it appearing to this Court that certain of the beneficiaries under the alleged last will of Chas. Notley, Sr., deceased, to wit John K. Notley, Lily Notley & William K. Notley are the minor children of the said Chas. Notley, Jr. of the ages respectively of 20, 17 & 15 years and that their interests under the alleged will are adverse to him. It is hereby ordered that W. S. Wise, Esq., of Hilo, Island and Territory of Hawaii — and he is here- appointed as the guardian *ad litem* to the aforesaid minor chaildren to wit John K. Notley, Lily Notley & William K. Notley and each of them to appear for and represent them in the matters relating to the probate of the aforementioned will.

(Signed) W. J. ROBINSON,
Third Judge of the First Circuit Court being the Judge Presiding at the Trial of the Above Entitled Cause.

Endorsed: Circuit Court Fourth Circuit. *Re* Estate of Chas. Notley, Deceased. Order Appointing Guardian *ad Litem*. Filed January 19th 1903. Daniel Porter, Clerk.

109 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15. 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Circuit, Territory of Hawaii, January Term, A. D. 1903.

In the Matter of the Estate of CHARLES NOTLEY, SR., Deceased.

Order for Entering up Judgment.

Upon the entering up of the verdict on the appeal in this matter, It is hereby ordered that the Clerk of this Court do sign and enter up judgment in favor of proponents of the last will and testament of Charles Notley, deceased, in accordance with said verdict, and the decree admitting said will and codicils to Probate is hereby affirmed.

Done in open Court at Hilo this 28th day of January, 1903.

(S'g'd) W. J. ROBINSON,
3rd Judge of the Circuit Court of the First Circuit Presiding at the Trial in Accordance with Statute.

(Endorsed:) Circuit Court—Fourth Circuit—January Term 1903—In the Matter of the Estate of Charles Notley, Sr., Deceased.—Order entering up Judgment, etc.—Filed January 29th, 1903.—(S'g'd') Daniel Porter, Clerk.

110 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Circuit, Territory of Hawaii, January Term, A. D. 1903.

In the Matter of the Estate of CHARLES NOTLEY, Deceased.

Appeal of Charles Notley, Jr., *et al.* from Probate Order of Will, Etc., Etc.

Judgment.

This cause coming up at the January Term, 1903, of this Court for hearing upon the appeal of Charles Notley, Jr., Maria Hughes, David F. Notley and Wm. Notley from the order of Probate made by the Hon. Gilbert F. Little, Judge of the Circuit Court of the Fourth Circuit, in Probate on the 19th day of September 1903, and upon the issues of facts stated and set forth upon behalf of said Charles Notley, Jr., *et al.*, and allowed by the presiding Judge of said Court and the trial of said appeal and said issues of fact having been assigned to the Hon. W. J. Robinson for trial and the proponents and contestants being at issue before the jury, and the trial of said appeal and said issues of fact having commenced on the 22nd day of January, 1903, and continued from day to day and from time to time until the 28th day of said month, and said jury having on said 28th day of January, 1903, after hearing the evidence and upon instruction of the Court, the jury rendered their verdict, signed by the foreman and being called say We, the jury in the above entitled cause, find for the proponents and to the first question of fact submitted to us answer and say that the will and codicils dated respectively May 18, 1899, August 2, 1900, and April 11, 1902, are the last will and codicils of Charles Notley, deceased, and in answer to the second question of fact submitted answer, say and find, that said will and codicils were not executed by, under or by virtue of undue influence exercised by Emma Danford at the time of the execution and publishing by the said
111 Charles Notley, deceased, of said will and codicils thereto.

Wherefore by virtue of law and by reason of the premises, it is ordered, adjudged and decreed that judgment according to said verdict be entered, in favor of the proponents of said will, and that said will and codicils thereto are the last will and testament and codicils of said Charles Notley and that at the time of the execution and publication of the same they were not executed by him,

by, under or by virtue of undue influence exercised by Emma Danford.

And it is further ordered, adjudged and decreed, that upon the entry of said verdict, that the judgment, order and decree of the Hon. Gilbert F. Little, Judge of the Circuit Court of the Fourth Circuit, sitting in Chambers in Probate admitting the will and codicils of Charles Notley, Sr., deceased, to probate, be and the same is hereby affirmed.

Dated at Hilo, Territory of Hawaii, this 28th day of January 1903.

(S'g'd) A. S. LE BARON GURNEY,
Clerk Fourth Circuit Court.

Judgment entered this 28th day of January, 1903.

(Seal) This 8th day of June, A. D. 1905 as of the 28th day of January, 1903.

(Endorsed:) In the Fourth Circuit Court, Territory of Hawaii. In the Matter of the Will of Charles Notley, Deceased.—Judgment. —Filed January 29th, 1903—(Sgd.) Daniel Porter, Clerk.—Filed June 8th, 1905—(Sgd.) A. S. Le Baron Gurney, Clerk.

112 [Stamped:] Supreme Court, Territory of Hawaii, Feb. 15, 1906.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, Holden at Hilo, January Term, A. D. 1903.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Will Contest.

Bill of Exceptions of Contestants, William Notley, Charles Notley, Maria Hughes, and David F. Notley.

Be it remembered that the above cause came on duly for trial in this Court on the 22nd day of January, A. D. 1903, (Gilbert F. Little, Judge of said Court presided,)

On appeal by the above named contestants from an Order and Decree of said Judge sitting at Chambers in probate as Circuit Judge of said Circuit Court, dated September 19, A. D. 1902, admitting to probate as the last Will and Testament of said Charles Notley, Deceased and two codicils thereto, three certain instruments on file in this cause and Court, and dated respectively, May 18th, A. D. 1899; August 2nd, A. D. 1900; and April 11th A. D. 1902, and purporting to be the last Will and Testament of said Charles Notley and two codicils thereto.

That thereupon, to-wit, upon the said 22nd day of January,

A. D. 1903, upon the suggestion of said contestants that said
113 Gilbert F. Little was disqualified to preside at the trail of said appeal, having presided at Chambers in probate as aforesaid and having made the decree and order aforesaid appealed from, the said Gilbert F. Little, Judge as aforesaid, did then and there order said cause duly transferred for trial to the Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, then present at said January Term of said Circuit Court of the Fourth Judicial Circuit and authorized under commission in due form from the Chief Justice of the Territory of Hawaii, to try said cause in the place of said Gilbert F. Little, disqualified as aforesaid.

Thereupon, to-wit, upon said 22nd day of January, A. D. 1903, and after said Judge Robinson has assumed jurisdiction of said cause, the same then and there being in order for trial, said contestants duly moved before said Judge Robinson that said cause be set down for trial before a jury and that a jury be duly empaneled forthwith to try the following issues of fact, to-wit:

First. Are the documents, dated respectively May 18, A. D. 1899, August 2d, A. D. 1900, and April 11, 1902, propounded before the Honorable Gilbert F. Little aforesaid sitting in probate at Chambers as the last will and testament of Charles Notley, Deceased and codicils thereto (and admitted to probate as such by said Judge by Order dated the 19th day of September, A. D. 1902) the last will and testament of the said Charles Notley, Deceased and codicils thereto?

Second. Were such alleged will and codicils thereto executed and published by the said decedent, Charles Notley as and for his last will and testament and codicils thereto by, under and
114 — virtue of undue influence exercised by one Emma Danford residing in the Territory of Hawaii (and beneficiary and devisee mentioned in said alleged will and codicils thereto) over the said Charles Notley, Deceased, at the time of the executing and publishing by the said Charles Notley Deceased of said alleged will and codicils thereto.

Thereupon, to-wit, upon said 22nd day of January, A. D, 1903, said motion last hereinabove named for the empaneling of a jury, etc. was duly granted, and thereupon the Court ordered a jury empaneled forthwith to try said issue of fact.

The Proponents of said last Will and Testament then and there being represented by Cecil Brown, Esq., and G. A. Davies, Esq., Emma Danford, one of the beneficiaries under said alleged last will and testament and codicils thereto, by W. L. Stanley, Esq.; the contestants aforesaid and the widow of decedent by Kinney, McClanahan & Bigelow, and the minor children of Charles Notley, the son of decedent, to-wit, John Notley, Victoria M. K. Notley, Lily Notley and Wm. Notley by W. S. Wise, Esq., Guardian *ad litem* of said minor children thereunto duly appointed by order of said Judge Robinson.

Twelve jurors having been empaneled and sworn upon their *voir dire*, counsel for proponents proceeded to open the examina-

tion of said jurors touching their competency to sit in said cause, whereupon W. A. Kinney, counsel for contestants, objected and claimed for contestants the right to first examine said jurors and otherwise to open and close in the trial of said cause. Upon argument had the Court ruled, the proponents have the right to open and close and the contestants have no such right, to which ruling contestants aforesaid duly excepted and said exception was duly allowed.

First Exception.

The examination of the jury was then proceeded with, proponents openings in the examination of the jurors upon their —.

115 During the empaneling of the jury as aforesaid the Court adjourned until Friday, January 23, A. D. 1903, at 9 A. M., whereupon further proceedings were had in said cause as follows, The jury being empaneled and accepted by all parties said Friday forenoon, January 23, A. D. 1903, the same was duly sworn to try the cause.

Thereupon, Cecil Brown, Esq., attorney for proponents, made the opening statement for proponents to the jury, proceeding to introduce and read the following in evidence:

The original Petition for Probate herein.

Said alleged Will and two codicils thereto marked Exhibit "A."

The following testimony introduced by proponents at the hearing of this cause at Chambers in Probate as aforesaid, to-wit:

The testimony of Daniel Porter, Dr. George Herbert, J. G. Lenhart, Frank Fernandez, Anthony Lidgate, Cecil Brown.

Proof of Publication in the Honolulu Bulletin of Notice of the Hearing had at Chambers in Probate,

Stipulation entered into by counsel that the hearing should be continued from July to September,

Bond of Temporary administrator,

Inventory,

Notice of Appeal and Appeal of Contestants from the Order of Probate aforesaid, dated Sep. 19, 1902, filed Sep. 20th,

116 Order of Probate of said Will and codicils and the findings of fact therein contained,

Order appointing temporary Administrators,

Letter, Contestant's Exhibit "A" in Proceedings at Chambers, signed by Charles Notley, addressed to A. Lidgate.

Recess is here taken.

Upon re-assembling, the following proceedings were had:

Cecil Brown was called and upon being duly sworn, testified orally in behalf of proponents.

See Trans. of Ev. pages 6 to 20, both inc.

Thereupon proponents rest.

Contestants thereupon open to the jury and thereafter call Samuel Parker who, upon being duly sworn, testified in behalf of contestants.

See Trans. of Ev. pages 21 to 32, both inc.

Thereupon recess is taken from 5:30 P. M. to 7 P. M. in the evening of said day, to-wit, the 23rd day of January, A. D. 1903.

Upon re-assembling at 7 P. M. on said 23rd day of January, A. D. 1903; the following proceedings were had.

Frank Andrade was called on behalf of the Contestants and being duly sworn testified in behalf of contestants.

See Trans. of Ev. pages 23-42, both inc.

During the examination of said witness, contestants introduced in evidence, read to the jury and had filed as Exhibit "I" a certain option purporting to have been signed by deceased in favor of the said Frank Andrade.

Exhibit "I" is filed.

117 Contestants then called S. F. Chillingworth, who was duly sworn and testified on behalf of contestants.

See Trans. of Ev. pages 43-61, both inc.

Contestants then called Maria Hughes who was duly sworn and testified in behalf of contestants.

See Trans. of Ev. pages 63-70 both inc.

Exhibits 2 to 19 both inc. filed.

During the examination of said witness certain letters and envelopes accompanying the same and purporting to have been written by decedent were duly introduced in evidence and filed, constituting Contestants' Exhibit- 2-16" both inclusive. Contestants, continuing the examination of said last named witness, also introduced in evidence and had filed as such, certified copies of certain deeds, which were marked respectively Exhibits "17, 18 and 19." During the examination of said Maria Hughes, adjournment was taken at 9:50 P. M. to Saturday, January 24, A. D. 1903 at 9 A. M., at which time further proceedings were had as follows:

The examination of the said Maria Hughes was continued and completed.

Contestants then called Emma Notley, who was duly sworn and testified on behalf of contestants.

See Trans. of Ev. pages 95-146 both inc.

During the examination of said last named witness, the following questions were put to said witness and the following answers and proceedings were given and had, to-wit:

Q. Please tell us what she said when she wailed?

A. She wailed, "It is the first time she'd have any of her children turned out of the house."

Mr. STANLEY: I object and move it to be stricken out until it is shown Mrs. Danford understood the wail.

The COURT: The question does not call for an answer

118 which would look to the impeachment of any witness and for that reason the motion is denied, to strike out.

Mr. STANLEY: I note an exception your Honor.

The COURT: Exception allowed.

Mr KINNEY: Tell us what she said in her wailing to her husband, put it in Hawaiian.

(No answer.)

Q. Did Mr. Notley understand Hawaiian?

A. Certainly.

Q. Give it to us in Hawaiian.

A. She said "Auwe kuu keike."

(Hawaiian interpreter sent for.)

Mr. KINNEY: I ask that it go on the record in the Native tongue.

(Mr. Charles Hitchcock acts as Hawaiian interpreter at this point, being sworn for that purpose.)

Mr. KINNEY: What is the first you say?

A. "Auwe kuu keike kau mea aloha na keike."

INTERPRETER: Alas, my children, the ones that I love, my children you are all being expelled from your home.

(The witness continues to speak in Hawaiian.)

Mr. KINNEY: Anything more you can remember?

A. (Through interpreter.) Where we have lived patiently——

Mr. BROWN: I object to what the witness is stating now in Hawaiian as not being what she said before.

(The interpreter takes down the witness's statement in Hawaiian to be copied by the stenographer in his notes.)

Recess here taken until 1:30 P. M. Upon re-assembling at 1:30 P. M. the following proceedings were had concerning the evidence about wailing given before the recess was had:

Mr. KINNEY: May it please the Court, we contend that what was said by Mrs. Notley to her husband in the manner indicated by the witness——

119 Mr. DAVIS: When, Mr. Kinney?

Mr. KINNEY: We are only talking about one occasion. You can ask the record and find out.

What was said by Mrs. Notley on the occasion testified to by the witness is relative as part of the *res gestæ* and as tending to show the nature and degree of force of the appeal made by her husband and to enable the jury to judge of the mental condition and the attitude of his mind towards his wife and son Charles at that time.

Mr. DAVIS: It is submitted that the only ground upon which statements are admissible, even by testator, as part of *res gestæ* (Citing authorities.)

The COURT: The motion is granted. The answer of the witness may be stricken out and the jury instructed to absolutely disregard any statements made by the witness as to the declarations made by her mother upon the occasion testified to.

Second Exception.

Mr. KINNEY: We note an exception.

The COURT: Exception allowed.

Mr. KINNEY: I would like to state that I offered the evidence for the purposes—I wish it to appear now that the evidence was offered

for the purposes and is offered for the purposes I have stated in opening the argument.

The COURT: It is so understood. I think the reporter also has the statement made by you.

See page- 93, 94 and 95, Trans. of Ev.

At 5 P. M. of said 24th day of January, 1903, an adjourn-
120 ment was taken until Monday, January 26th, 1903, at 9 o'clock A. M., the witness Emma Notley still being under cross examination when such adjournment was had.

On Monday, January 26th, 1903 at 9 A. M. further proceedings were had as follows, to-wit. No further cross examination of the witness, Emma Notley, was had and thereupon, contestants called Cecil Brown who was duly sworn and testified in behalf of contestants. See ev. page 147.

W. L. Stanley was then called and testified for contestants.

Trans. of Ev. pages 148-150 both inc.

John Tavares was then called by contestants and being duly sworn testified in behalf of contestants.

See Trans. of Ev. pages 151-166 both inc.

Exhibits 20, 21 & 22 filed.

During the examination of said last named witness contestants introduced in evidence and filed as Exhibits in the case, certain photographs, to-wit, Contestants' Exhibits "20, 21 and 22."

Contestants then called Miss Martha A. Hughes, who was duly sworn and testified in behalf of contestants.

See Trans. of Ev. pages 167-200 both inc.

During the examination of the last named witness a recess was taken at 12 M. until 1:30 P. M.

At 1:30 P. M. of said 26th day of January, A. D. 1903, the examination of the last named witness was continued. During the examination of the last named witness (see page 169 of the Trans. of Ev.) the following questions were asked and answers made thereto, and the following proceedings had in connection therewith:

Q. Then did anything else occur about that, about your going home ahead of time?

A. Yes sir.

Q. What was it?

A. On the occasion that my grandmother wailed.

121 Q. Who was present? Had you heard your grandmother?

A. Lily, Keala, Mrs. Danford and myself.

Q. What, if anything, did Mrs. Danford say?

A. She asked Keala what the matter was with grandmother and Keala went out of the room to find out and she came out and told us that grandmother had cried because Mrs. Danford was trying——

Q. (Int.) Was Mrs. Danford present at the time?

A. She was.
Q. Go on, now.

Judge STANLEY: As the statement of what somebody else told them outside, is that evidence, your Honor? I object to that as being incompetent, inadmissible and hearsay.
The COURT: Objection sustained.

Third Exception.

Mr. KINNEY: I note an exception.
The COURT: Exception allowed.

The last named witness, concluding her evidence, contestants then called Charles Notley, who was duly sworn and testified in behalf of contestants.

See Trans. of Ev. pages 201-250 both inc.

During the examination of the last named witness, Charles Notley, a recess was taken to 7 o'clock P. M. in the evening of said day, to wit, the 26th day of January, 1903.
Contestants then recalled Mrs. Maria Hughes, previously sworn, who thereupon testified in behalf of contestants.

See Trans. of Ev. pages 251-275 both inc.

During the examination of the last named witness, the following questions and answers were put and given and the following proceedings had thereon.

See Trans. of Ev. 354 and '5.

122 Mr. KINNEY: I had asked whether or not, your father said anything, about what he himself had done in the matter.
A. He also told me he had struck mother, something he had never done in his life before. He was very sorry for it. He always looked upon men who did such things as dirty brutes and he had brought himself down to that.
Mr. STANLEY: I move that be stricken out as hearsay and inadmissible.
The COURT: The motion is granted. This statement of the witness is stricken from the record and the jury are to disregard it absolutely.

Fourth Exception.

Mr. KINNEY: I note an exception.
The COURT: Exception allowed.

At the conclusion of the evidence of the last named witness, contestants cal-ed David Notley who was duly sworn and testified in behalf of contestants.

See Trans. of Ev. pages 276-302 both inc.

At 10:10 P. M., the witness, David Notley being on the stand under cross examination, the Court adjourned until Tuesday, Janu-

ary 27, 1903, at 9 A. M., at which time further proceedings were had as follows:

The examination of David Notley was concluded.

Mrs. Maria Hughes was recalled by contestants and testified further in behalf of contestants.

See Trans. of Ev. pages 303-323 both inc.

Contestants then called Victoria M. K. Notley, who was duly sworn and testified in behalf of contestants.

See Trans. of Ev. pages 324-370, both inc. except pages 348 to 359 containing deposition not read.

123 During the examination of the last named witness the following questions ans answers were put and given and the following proceedings had in connection therewith.

See Trans. of Ev. pages 339 and 240.

Q. Well, what was it?

A. I think during the conversation there was some remarks passed about accents in different American places.

Q. What nationality was Miss Ellis?

A. She was an American.

Mr. BROWN: I object. That has nothing to do with the case, what accents passed between Mrs. Danford and Miss Ellis.

The COURT: This whole case does not hinge on this little motion to strike out. The motion is granted. The testimony of the witness in regard to American accents may be stricken from the record.

Fifth Exception.

Mr. KINNEY: Then I note an exception.

The COURT: The ruling stands, however, that some remarks about American accents may be stricken out.

Mr. KINNEY:

Q. Will you please tell where this conversation took place?

A. At the table.

Q. Who started it?

A. Mrs. Danford did.

Q. What did Mrs. Danford say?

A. It is about different accents.

Q. Just what did she say?

A. It is, "Some Englishmen say neither (nither) and some Americans say neither (neether) and she thought the English saying was better.

Mr. BROWN (int.): I object to the answer.

The COURT: The motion is granted.

Sixth Exception.

Mr. KINNEY: I note an exception.

The COURT: Exception allowed.

During the examination of the last named witness recess
124 was taken at 12 M. until 1:30 of said 27th day of January A. D. 1903, at which time further proceedings were had as follows.

The last named witness, towit, Victoria M. K. Notley concluded her evidence.

Contestants then called Lily Notley who was duly sworn and testified in behalf of contestants.

See Trans. of Ev. pages 371-386 both inc.

Contestants then called John Notley who was duly sworn and testified in behalf of contestants.

See Trans. of Ev. pages 387-395 both inc.

Contestants then offered in evidence certain Account and Receipt books of Charles Notley & Sons, as follows, to-wit:

Receipt Book of Charles Notley & Sons for the year 1886.
Receipt book of Charles Notley & Sons for the year 1895.
Receipt book of Charles Notley & Sons for the year. 1884.
Pay roll of Charles Notley & Sons for the year 1883-4-5.
Press Copy book of Charles Notley & Sons for the year 1886.
Press copy book of Charles Notley & Sons for the year 1885.
Press copy book of Charles Notley & Sons for the year 1883, said books and receipts being offered in evidence to show that business was conducted under the name of Charles Notley & Sons and business done along those lines.

Seventh Exception.

The Court refused to admit said books or receipts or any of them in evidence to which ruling the contestants' counsel duly excepted and said exception was duly allowed.

See Trans. of Ev. pages 398, 399.

Exhibit 24 is filed.

During the examination of said last named witness certain receipted bills for the schooling of the children of Charles Notley were introduced in evidence and filed to be marked Exhibit "24."

125 Thereupon contestants closed their case.

Thereupon proponents presented and made the following motion:

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

In the Appeal of Charles Notley *et al.* from the Order of Probate.

In the Matter of the Last Will and Testament of CHARLES NOTLEY, SENIOR, Deceased.

Contestants having closed, now comes Cecil Brown, and Anthony Lidgate, proponents of the last Will and Testament of the late

Charles Notley, Sr., Deceased, and move the Court here that the jury empaneled to try this cause on the appeal of Charles Notley, Jr., David Notley, Maria Hughes and William Notley, from the Order of Probate made by the Circuit Court of the Fourth Circuit on the 19th day of September, 1902, and upon the issue of fact filed in this Court on the 21st day of January, 1903, be directed and instructed to find a verdict for the proponents of said will. This motion is based upon the records in this cause and upon the grounds stated and filed with the stenographer upon the filing of this motion.

(Signed) ANTHONY LIDGATE,
CECIL BROWN,
By Their Attorneys, GEORGE A. DAVIS.
W. L. STANLEY.
CECIL BROWN.

Dated at Hilo, January 27th, 1903.

See Trans. of Ev. page 400, 401 and 402.

The Court thereupon adjourned until Wednesday, January 28th, A. D. 1903, at 9 A. M., when further proceedings were had as follows:

Eighth Exception.

The Court after having heard argument upon proponent's motion that the jury be directed and instructed to find a verdict for proponent, granted and allowed the same, whereupon counsel for contestants excepted to the ruling of said Court and to the granting of said motion. Exception was duly allowed.

Whereupon counsel for proponents then moved orally that the Court instruct the jury and ask them to bring in a verdict
126 according to the form submitted, which said form submitted as aforesaid, is as follows:

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

Judge W. J. Robinson presiding.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

We, the jury in the above entitled cause find for the proponents, and to the first question of fact submitted to us answer and say, that the will and codicils dated respectively, May 18, 1899; August 2, 1900; and April 11, 1902, are the last Will and Codicils of Charles Notley, Deceased, and in answer to the second question of fact submitted, answer, say and find that said will and codicils were not executed by, under or by virtue of undue influence exercised by Emma Danford at the time of the exception and publishing by said Charles Notley, Deceased, of said will and codicils thereto.

(Signed) —— ——, *Foreman.*

Hilo Hawaii, Territory of Hawaii, January 28th, A. D. 1903.

Ninth Exception.

Whereupon the Court granted said motion that the jury be instructed to bring in a verdict according to the form aforesaid, whereupon counsel for contestants excepted to the granting of said motion on the ground that the granting of the same is contrary to the law and the evidence and not justified by the evidence adduced in behalf of the contestants to the will, which exception was duly allowed.

Tenth Exception.

Whereupon the Court instructed the jury to find a verdict for the proponents in the form aforesaid. Thereupon and before said verdict was rendered and while the jury were undischarged *abd* before said cause had been committed to them by the Court, counsel for contestants excepted to the instructions given by the Court to the jury, particularly to that instruction directing the jury to find a verdict in the form hereinabove set forth, which said exceptions were duly allowed.

127 Eleventh Exception.

Whereupon, the jury in pursuance of said instruction, chose a foreman without retiring and thereupon said jury ret*u*ned a verdict for the proponents in the form requested by proponents as aforesaid and submitted to them by the Court as aforesaid. Whereupon counsel for contestants excepted to the verdict as so rendered as aforesaid, as contrary to the law and evidence and to the weight of evidence and gave notice of intention to move for a new trial on the ground that said verdict was contrary to the law and the evidence and the weight of evidence, which said exception was duly allowed by the Court.

The Court thereupon discharged the jury from further service in the case.

Thereupon counsel for contestants filed a motion for a new trial and before filing the same paid all costs of Court and deposited $100 in lieu of bond for costs to accrue, which said motion for a new trial, is as follows:

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, January Term, A. D. 1903.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

Motion for a New Trial.

Maria K. Notley, Charles Notley, Maria Hughes, William Notley and David Notley, contestants herein, hereby *more* for a new trial herein and that the verdict rendered herein be set aside *on* the following grounds, to-wit:

First: That said verdict is contrary to the law and the evidence and the weight of evidence.

Second. For erro-s of law committed by the Trial Judge in refusing to admit evidence that should have been admitted in behalf of the contestants and as erroneously admitting evidence that should have been excluded and for errors in instructing the jury and duly excepted to.

This motion is based upon all records and papers herein and the stenographer's notes of evidence and proceedings herein.

Dated, January 28th, A. D. 1903.

KINNEY, McCLANAHAN & BIGELOW,
Attorneys for Contestants.

128 Twelfth Exception.

Whereupon said motion was duly heard and over-ruled, whereupon counsel for contestants excepted to the refusal of the presiding judge to grant said motion for a new trial, which exception was duly allowed.

Thereupon counsel for contestants asked that the Court allow contestants forty days from the 28th day of January, 1903, in which to file and perfect appeal to the Supreme Court and Bill of Exceptions. No one objecting the Court so ordered.

Whereupon counsel for contestants further asked that it be agreed by counsel that the Judge might pass upon the Bill of Exceptions in Honolulu and without coming to Hilo, which was agreed by counsel for all parties before the Court.

The stenographer's transcript of the evidence proceedings, orders and rulings and charge to Jury taken at the trial of this cause on appeal and of evidence taken at Chambers in probate, and made a part of the evidence in this cause on appeal; and all documents, papers, minutes, pleadings and exhibits comprising part of the record of this case on appeal, including the Judge's charge to the jury, the Motion for the trial of certain issues of fact, by a jury made by contestants herein, are hereby made a part of this Bill of Exceptions.

Dated, March 5, A. D. 1903.

CHARLES NOTLEY,
MARIA NOTLEY,
DAVID F. NOTLEY &
WM. NOTLEY,
Contestants,

(Signed) By Their Atty's, KINNEY, McCLANAHAN & BIGELOW.

Honolulu, March 6th, 1903.

129 The foregoing Bill of Exceptions being found to be conformable to the truth and to be a true and correct record of the proceedings and constituting a true and correct Bill of Exceptions, the same is hereby allowed this 23rd day of March, A. D. 1903.

(Signed) W. J. ROBINSON,
Judge Presiding at the Trial of Said Cause.

130 I, Judge W. J. Robinson, presiding at the trial of the foregoing cause, do hereby certify that the record herein includes the following pleadings, papers and documents, to-wit:

1. Petition for Probate of the Will of Charles Notley, Deceased, and codicils thereto, signed by Cecil Brown and Anthony Lidgate.
2. Will of Charles Notley, Deceased.
3. First codicil thereto.
4. Second codicil thereto.
5. Appearance of Charles Notley and others, contestants.
6. Stipulation between contestants and proponents as to time of hearing at Chambers, etc.
7. Order appointing temporary administrator.
8. Affidavit and proof of publications of Notice of hearing of Probate of Will.
9. Bond of Temporary administrator.
10. Order and decree of Judge Little dated Sep. 19, A. D. 1902 admitting will to probate, etc.
11. Notice of appeal and Appeal by contestants from said Order and Decree.
12. Clerk's Minutes of the Proceedings at Chambers in Probate in the above entitled cause.
13. Inventory filed by proponents of will.
14. Transcript of the evidence of Daniel Porter, at Chambers, in Probate.
15. Trans of Ev. of D. George Herbert given at Chambers, in Probate.
16. Transcript of Evidence of Cecil Brown, given at Chambers in Probate.
17. Transcript of Evidence of J. G. Lenhart, given at Chambers, in Probate.
19. Transcript of Evidence of A. Lidgate, given at Chambers in Probate.
20. Clerk's Minutes of proceedings in the Circuit Court of the Fourth Circuit on appeal.
20½. Motion for trial of issues of fact before a jury and affidavit of D. K. Notley attached thereto.
21. Stenographer's Trans. of Evidence, proceedings, orders, rulings and Charge to the Jury, given and had in the Circuit Court of the Fourth Circuit on appeal.
22. Contestants' Exhibits 1-24, both inclusive filed by Contestants and books of Charles Notley & Sons refused admission as evidence and grounds filed therefor.
23. Proponent's Motion to direct verdict.
24. Contestants' Exception to granting of Motion to direct verdict.
25. Verdict of the Jury.
26. Contestants' Exception to the verdict.
27. Contestants' Motion for new trial.
28. Contestants' Exception to the refusal to grant Motion for new trial.
28½. Motion and Order appointing W. S. Wise Guardian *ad litem* of the minor children of Chas. Notley, Sr.
18. Transcript of the evidence of Frank Fernandez given at Chambers in Probate.

131 29. Order extending time to file Bill of Exceptions herein.
30. Clerk's certificate of payment of costs and deposit of cash bond.

And I do further certify that the foregoing record contains all the pleadings, papers, and Exhibits necessary for the proper consideration of the case by the Supreme Court, and that the foregoing exceptions have been duly perfected according to law and are entitled to be docketed and heard in the Supreme Court, T. H.

(S'g'd) W. J. ROBINSON,
Judge Presiding at the Trial of the Above Case.

Dated, Honolulu, T. H., March 23rd, A. D. 1903.

Endorsed: Circuit Court, 4th Judicial Circuit, In the Matter of the Estate of Chas. Notley, deceased. Will Contest. Contestants' Bill of Exceptions. Filed March 6, 1903. Presented at 3:35 P. M. and Filed March 6, 1903, in 4th Circuit Court. (S'g'd) Henry Smith, Clerk Jud. Dept.

132 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court, Fourth Circuit, of the Territory of Hawaii, January Term, 1903.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

On Appeal to the Supreme Court from an Order of Hon. W. J. Robinson, Directing Verdict for Proponent.

Testimony Adduced on Behalf of the Contestants.

132½ [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, January Term, A. D. 1903.

HILO, HAWAII, THURSDAY, *January* 22, 1903—7 p. m.

In the Matter of the Estate of CHARLES NOTLEY, SR., Deceased.

Appeal from Order of Hon. G. F. Little, Sitting at Chambers, in Probate, Admitting to Probate a Document Purporting to be the Last Will and Testament of Deceased and Directing Issuance of Letters Testamentary Thereon.

Appearances.

Messrs. Cecil Brown and George A. Davis, counsel for executors.
W. L. Stanley, Esq., for Mrs. Emma Danford and child.
Messrs. Kinney, Ballou & McClanahan, assisted by Alex. Lindsay, for contestants.
W. S. Wise, Esq., Guardian *ad litem*, for minor children of Chas. Notley, Jr.

Before Hon. W. J. Robinson, Third Judge of the First Circuit Court, Presiding.

P. MAURICE McMAHON,
Official Stenographer.

133 *Evidence Given for Contestants.*

(Page 21, Official Transcript.)

SAMUEL PARKER, sworn on behalf of the contestants testified as follows:

Mr. KINNEY:

Q. Mr. Parker, what is your residence and occupation?
A. Honolulu just now; grazer.
Q. Where was the home of your youth?
A. In Hawaii; Mana; Hamakua, Hawaii.
Q. Do you know Mrs. Notley?
A. I do.
Q. What is she to you?
A. She is an aunt.
Q. In Hawaiian what is she?
A. She is in Hawaiian a makuahine; my grandmother and her father are, I think, are brother and sister.
Q. That makuahine in Hawaiian—what is that in English?
A. Well, you can call it aunt.
Q. What is makuahine in English?
A. Makuahine is mother.
Q. What would she call you in Hawaiian then?
A. Keiki, I think.
Q. When did you first know her?
A. Ever since I can remember; when I was a kid.
Q. Where was she when you first knew her?
A. At Waimea or Hamakua, that is Mana.
Q. Was she married then to Chas. Notley?
A. She was not married when I first knew her. I remember the time——

134 Q. Of the marriage?
A. Yes.

Q. What was Mr. Chas. Notley doing at the time of the marriage?
A. He was working for us.
Q. Doing what?
A. Taking care of sheep.
Q. He was an employee of Parker?
A. Yes.
Q. After that what did he do?
A. Well, he moved to Waimea; he had the tannery and the store in Waimea.

(End of Page 21 Official Transcript.)

Q. Do you know the children that he had by his wife?
A. Yes.
Q. Who were they?
A. Well, William Notley, he is at Molokai, and there was Charley and Maria—Mrs. Hughes—and David, and then one that I have

forgotten; that is one that escaped my memory at the time. He died very young.

Q. Do you remember how long Mr. Notley remained at Waimea?

A. I cannot tell you now.

Q. When he went to Hamakua?

A. I think he was in Waimea; it is but guess work on my part; I think it is in '74 or '75.

Q. Did you visit at the time that he went to Hamakua—did you visit in his home?

A. Yes, Waimea and Hamakua, too. When I went there I called there.

Q. Accepted their hospitality?

A. Yes.

Q. What kind of a home was maintained?

A. What do you mean by that?

Q. What kind of a housekeeper was the old lady; what was the condition of the house, table, etc.?

A. They had a very good house; they lived in those days
135 as good as they could; under the circumstances they were very comfortable there.

Q. What was the condition regarding the cleanliness?

A. Very cleanly.

Q. Who did the cooking?

A. Well, all hands cooked; when I went there they set the table for me; I don't know who cooked.

Q. Who do you mean by all hands?

A. More especially she would; I think they made extra dishes when I went there; they always gave me very good food.

Q. Were you the only one who accepted their hospitality?

(End of Page 22 Official Transcript.)

A. I suppose others of the family went there.

Q. Did you know of other foreigners going?

A. I have been there when Mr. T. H. Davies went there several times, and several of my friends.

Q. Who else?

A. And Mr. James Woods, my brother-in-law.

Q. Were there many?

A. Yes; at each of the times when I went there. I think when Spreckels went through the District of Hamakua he went there.

Q. Was there ever any inability shown to entertain hospitably and nicely on the part of Mrs. Notley?

A. Well, when I went through there with my friends I have been always welcome there, and I suppose there was others.

Q. Was there anything to call for the help of an outsider to entertain decently?

A. I don't remember outside of being there.
136 Q. When did you visit at the house proper of Charles Notley?

A. I don't remember.

Q. Do you know Mrs. Danford?

A. Yes.

Q. Did you ever visit at the main house of the Notleys after she came?

A. I am not sure about that; cannot say whether I was there or not.

Q. Do you recollect going after she was there?

A. I stopped there several times to call on Mrs. Notley; when I went there I went to see the old lady; there was a little cottage near the gate as you came down on the road, not in the main house, quite a little ways from the main house, where she stopped.

Q. What kind of a house was it?

A. That is a little cottage. I did not stop any length of time, just went inside to say how-do-you do to her.

Q. Did you go in the main house?

(End of Page 23 Official Transcript.)

A. No; that is I say no; I might have been there but I don't remember.

Q. On this occasion when you visited the aunt, did you go to the main house?

A. I don't think so.

Q. Why not?

A. Because I did not have the time to go in there; another reason I heard there was something about the family; but still anyway I did not go in.

(Page 24 Official Transcript.)

Mr. BROWN: I move that the witnesses' statement what he heard about the family be stricken out and the jury be instructed not to pay attention to it.

The COURT: It is so ordered that the statement as to what Col. Parker heard may be stricken out and the jury instructed to
137 disregard the statement as to what he heard.

Mr. KINNEY:

Q. In the older days, before Mrs. Danford came, when you visited the home, where were the children?

A. All of them?

Q. Well, the family?

A. Of course when I visited them in those days I think William was the head luna; they were all at work excepting the daughter and younger children; I think Charley too. I remember on the plantation when Mr. Notley took an active part in planting things, most of the older boys were at work. I think William was on the outside, head manager, and Charley I used to see him plowing. Anyway, those two boys were out most of the time; they would come home nights.

Q. In the evenings what was done?

A. Sometimes in the evening they would all be around the house.

Q. What was done in a social way at home?

A. I don't know; I know Charley used to sing.

Q. What was the relationship between the old gentleman and his wife and children?

(End of Page 24 Official Transcript.)

A. I think the old man was very happy with his children; that is what I could see, he would have his children around.

Q. What made you believe that?

A. By the way they went around the room singing and talking. Of course I did not see anything out of the way; like any happy family would be.

Q. What was the condition of things at Waimea?

A. At Waimea they were much younger; I don't know
138 much about Waimea, because I would only occasionally call in there; they were younger there and all at work; even the father, mother and the boys that were big enough, I would see around with the mule team. Of course I didn't pay particular attention to what they were doing, but I saw the old man made his children work.

Q. What were Mrs. Notley's habits regarding work?

A. I think I saw her around the kitchen; she would be cooking. When I went there to take my meals she would be waiting on me at the table, trying to fix up something extra I suppose.

Q. What were her general habits regarding work?

A. I noticed their house was always neat and clean; the floor was like a man-o-war's deck. Everything looked well at the home as long as I remember.

Q. The floor was without a carpet but polished?

A. Yes.

Q. Do you know where Mr. Notley spent his evenings generally, whether or not out visiting, or how?

A. When I was there he was always in the house.

Q. With his family?

A. Yes.

Q. At meal times where used she to take her meals, Mrs. Notley, in those days?

A. When I was there?

Q. Well, on different occasions when you were there?

A. When I was there she ate at the table with us.

Mr. STANLEY:

Q. You say that you saw her, Mr. Parker?

(End of Page 25 Official Transcript.)

A. I know that. Of course she would bring extra dishes for me: they would kill a pig, etc. As far as taking her meals with her husband, of course when I am not there I don't know; I am speaking now of what I know.

139 Mr. KINNEY:

Q. Was there anything in her talk at the table that was offensive or anything of the kind?

A. Not to my knowledge.

Q. Do you have any recollection of any partnership or name that the old gentleman adopted?

A. That was in Hamakua, when they were at Paauilo I heard of Notley and Sons; if they were partners there I do not know; I

know they carried on business, that is what I knew at the time; it used to be "Notley & Sons."

Q. What business was that?

A. Well, planting sugar there, cane planting at Paauilo.

Q. Who were planting?

A. Mr. Notley was, that is, the family was; as I say, I know Mr. Notley was a planter there; planted cane for the Hamakua mill.

Q. Do you know anything about the land acquired by Mr. Notley?

A. Some of the land, I think.

Q. Do you know the circumstances under which he acquired the land of Kukaiau?

A. Yes, he bought that in Honolulu; if I am not mistaken, I think the land was put up at auction there. I think Kukaiau was. I went to Mr. Notley at the time, I think it was two or three days before the sale, I wanted to buy the land; I remember meeting Mr. Notley and asked him if he was going to buy it and he said he was. I said "If you buy the land, make a bid, I won't run you up, but if you buy for anybody else I will make a bid on that land." At that time we were always good friends.

Q. Did you have land around Kukaiau at the time?

A. We had lands up above.

(End of Page 26 Official Transcript.)

140 Q. Who owned Paauhau at that time?

A. At that time we owned all of Paauhau.

Q. Where was that in reference to Kukaiua?

A. There are several lands between there and Kukaiau: there are crown lands we had a lease of Kalopa. That nearly adjoins Kukaiau.

Q. What led you to step aside for Mr. Notley?

A. Well, I always talked with my friends and relations and as it is a kind of family affair, I did not want to run against them.

(Page 27 Official Transcript.)

Mr. STANLEY: I object to this line of examination. It is absolutely immaterial and irrelevant. I move to strike out all this evidence regarding the purchase of this land of Kukaiau on the ground that it is immaterial and irrelevant.

The COURT: In proceedings of this kind a vast deal of latitude seems to be allowed. Witness has said his forbearance was due to the friendship and relationship. How much friendship and how much relationship I don't know. That is a matter for the jury to determine. The objection will be overruled tentatively.

Mr. STANLEY: I note an exception positively.

Mr. KINNEY:

Q. What was the acreage of Kukaiau?

The COURT: I merely suggested tentatively, because I apprehend it should not be extended too far.

A. I do not know exactly; in the neighborhood of six or seven thousand acres; it is so long ago I don't remember.

Q. What is being done with the land now?

141 A. Part of it is in cane. I think Horner has a coffee plantation on a portion of it too.

Q. Where is the Horner ranch?

A. As I said, it runs from the sea up; I don't know where it runs up to; I don't know where the ranch is; I don't know how many acres of cane land; it runs from the sea up to the woods; I think it may be 800 or a thousand acres.

(End of Page 27 Official Transcript.)

Q. Do you know what it was bought at auction for?

A. What he bought it for?

Q. Yes; I mean how much did he pay for the property?

A. I think it is a dollar an acre, six or seven thousand dollars I think it is.

Q. What was the relation of Mrs. Notley towards foreigners, her conduct towards foreigners, her feeling. That is because of certain evidence that is to be made here later on.

A. The foreigners there she always treated—I think she had a foreigner for a husband. I have been there with foreigners and she has always treated us alike, always been pleasant to us.

Q. Do you know the boy David Notley?

A. Yes.

Q. Do you know where he was educated?

A. Well, I think it was in California, at San Mateo, and I think in Iolani College, Honolulu.

Q. After he came home from San Mateo college what became of him?

A. He was in Honolulu; I think he went up to the home, I am not sure.

Q. What has he been doing after he came from San Mateo?

142 A. I saw him a stevedore on the wharf, shoveling coal, a carpenter, and also driving mule wagons, driving Pain's cars for a while, and working on the wharf, too.

Q. Do you know about when he came from San Mateo?

A. Well, I don't recollect now; I can't say when it was

(Page 28 Official Transcript.)

Cross-examination.

Mr. BROWN:

Q. Mr. Parker, can Mrs. Notley read, speak or understand the English language?

A. I think so.

Q. Mrs. Notley, the old lady?

A. No, I don't think she does.

Q. Then she could not have entertained the foreigners very well; that is, enter into conversation with them, or entertain them as guests?

A. Well, I might go around more. I have an aunt the same way, could not talk English or read, and she used to entertain foreigners.

Q. I mean enter into conversation.

A. Well, not as well as my wife could, of course, but she used to entertain us there, when I have been there with strangers.

Q. When you went there with strangers was Mr. Notley present there too as a rule?

A. Mr. Notley was there; she could come in and she would look out for the table part of it. I have seen times when Mr. Notley introduced her to different ones there.

Q. As a rule were you in the habit of visiting much at the house, staying there over night?

A. I used to at one time, when I had an interest in Paauhau plantation I used to go there a good deal.

143 Q. As a rule you didn't spend the night there?

A. Every time I went there I used to, more so in those days than when later.

Q. Was that when they first went to Hamakua to live?

A. Well, I think it is nearly on to the '80's.

Q. From 1882 to 1883 or 1884; from that time down to the present time, or *Q.* until Mr. Notley's death, you haven't been there much?

A. Not so much; I passed by there but went on through.

Q. But the visits and entertainments you have testified to were all previous, say, to the year 1882, 1883, 1884 or 1885, with the exception of those times that you have just been going through and stopped there for a visit?

(End of Page 29 Official Transcript.)

A. I think it is about those times; I don't know exactly.

Q. When you were there at the times you stated who, as a rule, did the cooking?

A. I think he had a Chinese cook, too.

Q. It is so long ago your recollection is rather indistinct?

A. I think they always had a cook. Of course I used to go in the kitchen myself and see what they had for dinner. As I said before, the whole family was cooking and would bring up something for me when I went there.

Q. Was it cooked in Hawaiian style or foreign?

A. They had foreign; they had a kitchen there and killed the pig outside.

Q. You testified when Mr. Notley spoke to you about Kukaiau that as long as he wanted it you wouldn't take it?

A. I went to Mr. Notley myself.

Q. And told him?

144 A. I asked him if he was going to buy the land for himself; that I had an idea of buying it myself.

Q. You asked him and he said he was going to buy it himself?

A. I said "If you are going to buy it I will be there, if you give

up, whatever it is, when you quit I am going to bid on it"—something to that effect.

Q. When Mr. Notley purchased that land did he own any other land in Hamakua.

A. I think he did; I wouldn't swear, but I think he did own land there, because he lived in Hamakua.

Q. At Paauilo?

A. Yes, I think so.

Q. So really, the visits that have been made with Mr. Davies and Mr. Spreckels to this house were made previous to 1885?

(End of Page 30, Official Transcript.)

A. As I said before, I don't remember the year. I went there at different times. One time Spreckels was with me. Another time James Wood my brother-in-law; I stopped there over night several times; I think I stopped there over night with T. H. Davies; I wouldn't say with Spreckels.

Q. Did you ever see Miss Mullinger there?

A. I am not sure of that; I may have been there when she was there. I remember when she first came from England, but I don't remember exactly the year.

Q. Did you see her in the house?

A. I would not swear to it.

Q. Then, as a rule, except at such times as you went there with foreigners, your visits were paid principally to Mrs. Notley, Sr., on account of the relationship between you? At times when
145 you went there, I say, with foreigners your visits were on account of the relationship and to see Mrs. Notley?

A. I think so. When I went by I called in to see how the old lady was.

Q. And you being her Keike they treated you, as is customary among Hawaiians, to treat their relations?

A. Yes.

(Page 31, Official Transcript.)

Redirect examination.

Mr. KINNEY:

Q. You have spoken as to the question of Mrs. Notley being unable to speak English. Do you know what her understanding of English is?

A. She might; I do not think she speaks it; she might understand some words.

Q. Have you heard any comments from guests—foreigners she has entertained, on the quality of the hospitality they have received.

Mr. BROWN: I think that is part of the direct examination.

The COURT: As to whether or not she speaks English? On redirect examination the counsel is at liberty to support——

(End of Page 31, Official Transcript.)

Mr. BROWN (interrupting): He is talking of the entertainment she was able to give to parties who called there; that was brought out by contestants' attorney on direct examination.

(Reporter reads last question.)

Mr. STANLEY: We object to any attempt on the part of Mr.
146 Kinney now to state what he wants to prove. We state the question as to whether he heard comments or not as irrelevant and immaterial.

The COURT: I think the comments would come within the range of hearsay. The objection is sustained.

Recess taken at 5:35 p. m. to 7 p. m. this evening, the Court duly admonishing the jury.

(Page 33, Official Transcript.)

FRIDAY, *January 23rd*, 1903—7 p. m.

Jury and all parties present.

Mr. FRANK ANDRADE, sworn on behalf of the contestants, testified as follows:

Mr. KINNEY:

Q. Mr. Andrade, what is your occupation?
A. I am an attorney at law.
Q. Acting under full license?
A. Yes, sir.
Q. Where were you living in August, 1899?
A. In Honolulu.
Q. Did you know the decedent Chas. Notley in his life time?
A. I did.
Q. In the year 1899 did you do any business with him?
A. Yes, I had some business with Mr. Notley.
Q. What was the nature of it?
A. I entered into negotiations with Mr. Notley in regard to purchasing his interests in the Hamakua Mill Co., also to purchase from him his lands at Kukaiau.
Q. Who was this for?
A. It was for certain parties in San Francisco.
Q. About what time did you first approach Mr. Notley on the subject?
147 A. It was fully six months prior to the date of the option. I don't know exactly the date of the option; I would say April or May of 1899.
Q. When did you first meet Mr. Notley?
A. Do you mean when I began to transact this business?
Q. Yes, the first meeting.
A. The first meeting with Mr. Notley was I think on the corner of Merchant and Fort street, outside McInerny's.
Q. What was the nature of the talk?

(End of Page 33, Official Transcript.)

A. I simply approached Mr. Notley at that time to find out whether or not he was disposed to sell his interests in the Hamakua [illegible] Co. and the Kukaiau lands.

Q. How did you find him disposed?

A. At the time he would not commit himself one way or the other.

Q. What did he say.

A. He told me at the time—I cannot repeat his words—that he would think about it and let me know.

Q. Did he let you know?

A. Later on—I cannot say just how long—after the first meeting I met Mr. Notley again, and then we went into negotiations more minutely.

Q. On the general proposition of selling it what did he say?

A. He finally concluded to sell the land at the time.

Q. And then negotiations followed?

A. As to terms, yes.

Q. How many interviews did you have with him?

A. I saw him down town once or twice, then after
148 that he asked me to come up to where he was living and out there we could speak more freely.

Q. Where was that?

A. Out on the plains.

Q. Whose place?

A. Mrs. Danford's, I think.

Q. On what street?

A. On the street mauka of Beretania street, running parallel to that.

Q. Kianu street?

A. Yes.

Q. How many times did you go there and talk this matter over with Mr. Notley?

A. Five or six times.

Q. Did you on any of those occasions see Mrs. Danford there?

A. Once or twice—possibly three times—Mrs. Danford would be on the lanai with Mr. Notley, and as I would approach the house, Mrs. Danford would go in the house and I would have the interview with Mr. Notley.

(End of Page 34, Official Transcript.)

Q. Would you get in the house before she retired?

A. She would go in the house before I got up stairs.

Q. Did you finally get the option for your San Francisco firm?

A. Yes.

Q. Is that the option (showing a piece of paper).

A. That is the option.

Q. Whose signature is that (pointing to paper).

A. That is the signature of Charles Notley and myself.

Q. Witnessed by Mr. Cecil Brown?

A. Yes.

149 Mr. Kinney reads in open court agreement between Chas. Notley and Frank Andrade.

The COURT: Do you offer this?
Mr. KINNEY: Yes.
The COURT: It may be received in evidence and marked contestants' "Exhibit 1."
(See Appendix Page 488 *Post.*)

Q. When did you first make any disclosures in regard to the business of this option, when did you first speak of it?
A. When did I first speak of this option? In Honolulu or away?
Q. In Honolulu.
A. I never spoke of that option to any person until long after the death of Mr. Notley, some four or five weeks I think.
Q. Did you go to San Francisco.
A. Yes, I went to San Francisco in December of 1899.
Q. Your option had nearly run out then?
A. It had run out, but Mr. Notley and I agreed that the option was to stand good and if I was successful he was ready to turn over the property at the time that the million dollars was paid to him.
Q. What was the condition of the market at the time you were given this option?

(End of Page 35 Official Transcript.)

A. The condition of the stock market at the time I opened negotiations with Mr. Notley was very good.
Q. What was it at the time you got to San Francisco.
A. It was on the decline; Hawaiian securities in the San Francisco market were not at a premium.
Q. Could you do anything?
150 A. I failed entirely.
Q. What reason, if any, did you have for not making mention of that during Mr. Notley's life?
A. It was a private business matter between Mr. Notley and myself, and Mr. Notley asked me not to say anything about the option to anybody.
Q. Were you acquainted with any of the members of his family at the time?
A. Yes, I knew David and Charley Notley.
Q. In your talk with—What was Mr. Notley's idea in imposing secrecy?
A. Well, more particularly that he didn't want Charley Notley to know of this option.
Q. Did he give any reason why?
A. His reason was that if the thing became known the whole transaction might be knocked on the head entirely; that is, obstacles might be put in the way. I cannot repeat Mr. Notley's words.
Q. How did this clause come in with reference to dower (referring to paper)?
A. That provision about dower was not spoken of at all before the option was prepared. Mr. Notley after the option—I forget whether it was before the option was ready for signature or at the

time it was ready for signature, then Mr. Notley spoke of the dower of his wife in the Kukaiau lands.

Q. What did he say?

(End of Page 36 Official Transcript.)

A. He said that he would not guarantee that his wife would sign the document transferring the title of the Kukaiau lands because she was in the hands of Charles Notley.

Q. Do you recollect—When was it in reference to this
151 conversation that he told you to keep quiet, particularly as to Chas. Notley?

A. I don't quite catch your meaning.

Q. You said just now that he would not guarantee to get the dower because his wife was under the influence of Charles Notley; when was that talk in reference to the talk when he wanted you particularly not to say anything about it to Charles Notley?

A. As my recollection serves me now, I think the talk about dower with reference to Charles Notley's influence over his mother was after the option was ready for signature, was already signed.

Q. Why were you not to tell it particularly to Charles Notley?

A. I talked——

Q. (Int.) What did he say?

A. He said Charles Notley had more influence over his mother than he himself, Chas. Notley, Sr., had over his own wife.

Q. What had that to do with it?

Mr. STANLEY: I object to the witness's opinion as to what that had to do with it. We will object to anything but what Mr. Notley said to him.

Mr. KINNEY:

Q. Well, what if anything was said by Mr. Notley as to the reasons particularly for not speaking—well, I will ask you was anything said about how the dower was to be got?

A. Mr. Notley said he would try to get the dower from his wife, but that the thing must be kept quiet.

Q. Did he indicate how he was going at it to get the dower, what his plan was?

(End of Page 37 Official Transcript.)

152 Mr. STANLEY: I object to any communication Mr. Notley may have given as calling for a question of opinion from this witness, on the ground that it calls for an opinion of the witness.

(Objection sustained.)

Mr. KINNEY:

Q. Did Mr. Notley say anything about what the plan was by which he would attempt to get the dower? Did he or did he not?

A. He did. This is some time ago and I have to think. Mr. Notley did say that he was going to try to get the dower and fix it up with his wife.

Q. He didn't say how?

A. To my recollection just now he didn't say how he was going to get it.

Q. Did he ever relax that injunction upon you not to tell about this?

A. Never.

Q. The evening that you last visited him before you went to San Francisco do you remember whether or not Mrs. Danford was then present; on the occasion of the last visit to Mr. Notley before the witness went to San Francisco?

A. To the best of my recollection Mrs. Danford was on the veranda and Mr. Notley at the time was sick; he had some bronchial trouble and she was there with him.

Q. How did you get in?

A. She didn't remain on the veranda. All my interviews with Mr. Notley at his house were on the lanai outside; he was on the porch as I remember it, with a rug or shawl over his shoulders.

153 Q. At any time during this conversation did Mr. Notley state why he was selling out?

A. Yes; Mr. Notley said he was getting old for plantation life and that he was going to—if this thing was a success he was going to live in Honolulu.

(Page 39 Official Transcript.)

Cross-examination.

Mr. STANLEY:

Q. As I understand you, Mr. Andrade, the proposition to enter into negotiations over this property came from you?

A. Yes.

Q. Not from Mr. Notley?

A. Not from Mr. Notley.

Q. You approached him?

A. I did.

Q. And on the occasion of your first interview he said he would think it over and let you know?

A. Yes, after a few days.

Q. As a matter of fact, instead of letting you know you again approached him?

A. We met on the sidewalk somewhere between McInerny's on Fort street, a little way up, about where Steiner has his curio shop now.

Q. He had sent no message in the mean time?

A. We accidentally met and talked over the matter.

Q. As a matter of fact, Mr. Andrade, was not this option, which has been put in evidence, prepared in Mr. Brown's office?

A. Yes; Mr. Notley had the option prepared, and I know it was prepared by Mr. Brown at his office.

154 Q. Was it not a fact that the question of the dower right was first raised by Mr. Brown in his office?

A. I don't think so.

Q. What is your recollection as to where that was first raised?

A. My impression is now it was raised in Mr. Brown's office by Mr. Notley himself when we were there together, inside Mr. Brown's office.

Q. And Mr. Brown was present at the interview.

A. Mr. Brown was not with us when we were talking this matter over. He was in the office to my best recollection. It was raised in Mr. Brown's office, but to my best recollection just now, Mr. Brown was not a party to the conversation.

(End of Page 39 Official Transcript.)

Q. The veranda of the house in Kinau street where you say that your interviews took place with Mr. Notley is arranged as a kind of sitting room?

A. You may call it that; there is a table there and easy chairs.

Q. A kind of smoking room?

A. On the same line, yes.

Q. As I understand you, Mrs. Danford was not present at any of the conversations with Mr. Notley?

A. No.

Q. Mrs. Danford, so far as you know, knew nothing of your business with Mr. Notley?

A. So far as I know, no one but Mr. Notley and myself knew anything of the business transaction we entered into.

Q. Excepting Mr. Brown?

155 A. I don't know if he knew about it.

Q. Did he prepare the document?

A. I mean when the negotiations were going on.

Q. Tell us exactly, as you go, what Mr. Notley said to you as to Charley Notley's influence affecting the dower right.

A. Mr. Notley said in regard to securing this dower he was going to try to secure the dower, but he would not be responsible if it was not secured, that Charles Notley had more influence over his mother than he, Mr. Notley himself Senior, had over his wife.

Q. Is that all Mr. Notley said to you about Charles Notley?

A. He said more.

Q. What did he say?

A. About Charles Notley?

Q. Yes; and his influence with his mother.

A. That Charles Notley controlled his mother, so far as his influence over his mother was concerned.

Q. Did he say anything else as to Charley Notley himself?

(End of Page 40 Official Transcript.)

A. Yes; he said other things concerning Charley Notley; he said that Charley Notley was—that he had spent a lot of money over Charley Notley, but that he was a rascal.

Q. When did he say this?

A. I cannot tell you at which interview but it was in regard to the dower.

Q. As I understand you, the old man gave you to believe that the obstacle to Mrs. Notley joining in that option was Charles Notley's influence over her?

A. That is the way I understood it.

156 Q. As a matter of fact, this option was given in the boom time wasn't it?

A. A little after the boom; that is the reason it didn't go through.

Q. You were just too late?

A. That's right.

Q. You say that that—You entered into negotiations fully six months before the date of the option?

A. Yes, sir, I believe so.

Q. That option is dated in August, 1899?

A. Yes.

Q. Do you know Mrs. Danford?

A. I have never met the lady.

Q. Did you think you were getting a good thing if you got that property at a million dollars?

A. Well, I was thinking I was getting a fair business proposition.

Q. And the old man thought the same did he?

A. Yes.

Q. You thought he would be getting a good proposition if he had gotten a million?

A. From my information and my own belief, I thought Mr. Notley was getting a pretty good thing.

Q. The terms were cash?

A. Absolutely.

Q. Absolutely cash one million?

A. Yes.

Q. What consideration did you give for the option?

(End of Page 41 Official Transcript.)

A. Absolutely nothing except the promise to buy if it was possible. I explained the whole situation to Mr. Notley and he told me he thought the thing was being done in good faith after he considered the matter thoroughly, and he gave me the option. He

157 first asked for me to put up a bonus and I explained to him it was impossible; that the parties with whom I had been dealing had gone to San Francisco and I wasn't going to take any great risk myself.

Q. Will you tell me what undue influence you had over Mr. Notley to get an option for the sale of all his property without consideration.

A. I don't know; there was a million dollars involved.

(Page 42 Official Transcript.)

Redirect examination.

Mr. KINNEY:

Q. Did those parties buy into the millions in this country?

A. They did.

Q. When was this option given; in connection with the sale of Paauhau?

A. Paauhau had been already floated in San Francisco; I could not say how long before.

Q. At what capitalization?

A. Five million dollars Paauhau.

Q. You knew Paauhau, Paauilo and Kukaiau fairly well?

A. Yes.

Q. If they could float and did float Paauhau at five millions, you were not afraid of this proposition at a million?

A. No.

(End of Page 42 Official Transcript.)

Mr. S. F. CHILLINGWORTH, sworn on behalf of the contestants, testified as follows:

Mr. KINNEY: Mr. Chillingworth, what is your occupation?

158 A. I am an attorney at law, sir.

Q. Were you ever acquainted with Charles Notley, Sr., in his life time?

A. I new him for something over thirty-four or thirty-five years.

Q. When and where did you first make his acquaintance?

A. First at Waimea on this Island on or about the latter part of March or April, 1867.

Q. How intimate did your acquaintance come?

A. Very intimate indeed.

Q. How long did he remain in Waimea after you located there in 1867?

A. When I left Waimea about '77 or 1876 he was still there.

Q. When did you again resume an intimate acquaintance with him?

A. In the latter part of 1879, I think it was somewhere in the latter three months of 1879.

Q. What was the nature—how did that come about?

A. I went up to Paauilo to take the position of bookkeeper and correspondent for him on the plantation.

Q. That was when?

A. That latter part of 1879; I am not sure about the month.

Q. How long did you remain as his bookkeeper?

A. Something over three years.

Q. How intimate was your acquaintance during the three years?

A. It had been very intimate from the earlier portion for the first eight or ten years, from a business standpoint, and very close

159 personal friends; we exchanged confidences; and there were very few white people living in that section at the time, and became, what is seldom seen now, became very close friends.

(End of Page 43 Official Transcript.)

Q. Where did you live in Paauilo with reference to Mr. Notley's home?

A. Within about seventy-five yards of his own house; I lived there all the time.

Q. Vis-ting at his home frequently?
A. Well, practically all the time in and out, backwards and forwards.
Q. After you returned, or left his employ, where did you go?
A. I went from there to Maui.
Q. And resided there for some years?
A. For some fifteen or sixten years.
Q. And from there to Honolulu?
A. From there back to Honolulu.
Q. How often did you see Mr. Notley during those years?
A. I could not say with regard to any specific number, but on my journeys down here I frequently would meet him on the steamers and here on shore.
Q. I will ask you what Mr. Notley's occupation was in 1867?
A. He had a tannery and a small store in Waimea; he was married at the time and had a family; Kaluahine was his wife—that lady sitting there (pointing to Mrs. Notley).
Q. Did you visit at his home in Waimea?
A. Well, I could hardly call visiting in regard to when I
160 went to Waimea; it was my home, and when he came down to Kawaihae and he went upstairs that was a home for him. I ate there and slept there that winter when I stayed there for good.
Q. Who presided at the table of Charles Notley when you went there?
A. Himself as a rule.
Q. Where was the wife?
A. She would be there all the time.
Q. At the table?
A. Yes.
Q. Did you have an opportunity to note Mrs. Notley's capabilities one way or another as a housekeeper and entertainer?

(End of Page 44 Official Transcript.)

A. Notably very good; notably a close, industrious faithful housekeeper; in fact, her reputation was widely known as a hard worker.
Q. What was the condition of her home in cleanliness and order?
A. In splendid condition. I think it would be well for me to state when I first went there the home used to be near the tannery, but later on as he succeeded in his business, with which I was intimately acquainted, he purchased a place at Paauilo and there commenced to have more of a home than he had an opportunity to have at the other place.
Q. What kind of people did Mrs. Notley entertain?
A. There was a Mr. Hall there, who kept books there, and a party at the same table. Mr. Woods, Mr. Holmes, all of us who were young men, made that our headquarters when we went to Waimea.
161 Q. Were there any visitors from Kohala or outside?
A. I know that they didn't go to Mr. Parker's. They would go there at jury times, etc., and they would be entertained there. I could not specify what people, but I found people from Honolulu

there and they would come from Kawaihae and state that they would go to Mr. Notley's.

Mr. STANLEY: I move to strike out this statement as to the visitors going to Kawaihae and the jury be instructed to disregard that evidence.

The COURT: Counsel's request is granted and the jury is instructed to disregard the statement of witness, as to the visitors going to Kawaihae. That may be stricken out.

Mr. DAVIS: I now move to strike all this testimony that Mr. Chillingworth has given out as immaterial to this issue and as inadmissible for the purpose of showing undue influence within the motion and grounds of motion upon which counsel is attacking the last will and testament.

(End of Page 45 Official Transcript.)

The COURT: The motion is denied.

Mr. DAVIS: I respectfully except to your Honor's ruling.

The COURT: Exception allowed.

Mr. KINNEY:

Q. Was there anything, Mr. Chillingworth, in the hospitality and treatment of guests in the house of Mrs. Notley to offend or annoy anyone of fine sensibilities?

162 Mr. STANLEY: I object to the question as calling for an opinion of the witness, and as inadmissible, incompetent and irrelevant testimony.

Mr. KINNEY: Well, I will put it——

Mr. STANLEY: (Int.) I want a ruling.

The COURT: Counsel has withdrawn his question.

Mr. KINNEY:

Q. Please describe the old lady's hospitality to us.

A. As far as I was concerned, it was simple.

Q. Well, how and what did she do?

A. She always treated me and those who went there with me with the greatest courtesy, showing us rooms, arranging the clothing; and the dinner and everything was in proper order; and gave us water to perform our ablutions; with all general attention shown by a good housekeeper.

Q. What was the quality of the linen?

A. In all of those rooms——

Mr. STANLEY: I object; it is absolutely immaterial and irrelevant to the issues before the Court and jury.

The COURT: It seems to me that regarding this linen Mr. Chillingworth may be qualified as an expert in legislative or legal matters, but I do not know that he could qualify as an expert on linen. Why need you go into so much detail of the matter? It is only for the sake of brevity I suggest this.

Mr. KINNEY:

Q. Then we withdraw that and ask him what was the character of the hospitality extended by Mrs. Notley to her guests?

(End of Page 46 Official Transcript.)

163 A. It was in every sense as far as the hospitalities of the country lie, the best.

Q. Was it native food or foreign cooking?

A. Foreign cooking done by her, and later on his men—well, there was a cook eventually at Paauilo because more foreigners went to the table.

Q. I will ask you, Mr. Chillingworth, whether Mrs. Notley did any service in her husband's business, outside of the home duties in connection with the business?

A. I don't quite understand the question.

Q. What was his business at that time in Waimea?

A. He was in the tanning business.

Q. Did she do any work in the tannery?

A. I did not see of my personal observation.

Q. Did you visit at her home in Paauilo?

A. When I first arrived in Paauilo the house I was to occupy with my family was not thoroughly affiliated with the cookhouse, and for a month and a half perhaps I ate my meals at Mrs. Notley's table.

Q. What was the character of the table and the service in that home in Paauilo?

A. It was exceptionally good—perfectly satisfactory to me.

Q. What people visited there, if you remember?

A. I recollect Bishop Willis, Mr. Davies, Mr. Holmes, people from Kohala; in fact, their name was legion; people passing through Hamakua. At those times there was really no hotel and they made it a sort of stopping place.

Q. People of good habits—ladies and gentlemen?

A. Of good standing; yes.

Q. Did you know any of the officials in Hilo? Were you acquainted with Judge Austin and his wife?

(End of Page 47 Official Transcript.)

164 A. I never met them at Mr. Notley's.

Q. What was the home life of Mr. Notley, with his family and children at Waimea?

A. Very good indeed. He was a very affectionate father and took great pride in his family, especially in his two boys.

Q. What was his treatment of his wife?

A. It was very good indeed.

Q. Do you remember how he treated her those days?

Mr. STANLEY: I object, if the Court please. I think it is going a little too much into detail. It is incompetent and inadmissible to the issue before the Court and jury.

The COURT:

Q. What days were those?
A. It is before 1885. In the early part of 1883.

The COURT:

Q. The evidence shows what?—That Mrs. Danford came in the home of Charles Notley in 1885? The objection is overruled.

Mr. STANLEY: I note an exception, your Honor.
The COURT: The exception is allowed.

Mr. KINNEY:

Q. Do you remember any incident occurring here in Hilo?
A. No; I recollect an incident in Waimea, on this Island, during the Court term there.
Q. Please tell us that.
A. Mrs. Notley was a witness. I might be pardoned for saying that at the time I was Deputy Sheriff engaged in the prosecution of the case, so that it impressed itself on my memory. Mrs. Notley was a witness in a case against a native woman for using
165 improper language, and the Court, Judge McCully, was attending on the Circuit, and he asked questions in plain English that, had they been asked in Hawaiian, would not have had the same importance. Mr. Notley left his seat in the hall and

(End of Page 48 Official Transcript.)

went over and said to the Judge "I want you to recollect that woman is my wife and I want you to treat her as you would the best lady in the land."
Q. About what year was that?
A. That was at one of the November terms; it must have been in the early seventies, seventy or seventy-one.
Q. Mr. Chillingworth, referring to the home life of the Notleys, how were the evenings spent there?
A. Well, of course I knew more about the evenings at Paauilo than at Waimea. At Paauilo two or three times a week we would go over there and have singing. Mrs. Hughes, the present Mrs. Hughes, was there; quite an amusement, and the boys sang, and we would have a very enjoyable evening, as you would in any respectably conducted house.
Q. What part did the old gentleman take in these evening gatherings?
A. Extending hospitality; sometimes a drink or two to those that used it.
Q. What was the general character of those gatherings?
A. Pleasant to a degree; an ordinary social evening.
Q. All the family?
A. All the family.
Q. What were the boys doing at Paauilo, Charles and William?
A. The boy William was head luna and Charles Notley, Jr., was

at the time of my arrival assisting a man who was sent from
166 England to put up steam plows, and from him learned sufficient to operate them after leaving directions how to run the steam plows.

Q. What was the character of the service rendered by those two boys to their father?

A. Continuous and faithful. I was bookkeeper, keeping account of time, and had every reason to know what was going on.

(End of Page 49 Official Transcript.)

Q. In the starting of the plantation, were there any lands acquired as the plantation was started, leases, etc.?

Q. Yes; in fact part of the plantation lands my family are interested in.

Q. What family is that?

A. The Lindsay family. My wife is a Lindsay.

Q. Are the Lindsays related to Mr. Charles Notley?

A. There is an Hawaiian relationship there. I do not pretend to be able to analyze it, but it is accepted by them as a relationship.

Q. Did he acquire any of the Lindsay lands?

A. The principal part of Hamakua Plantation is Lindsay lands.

Mr. DAVIS: This evidence as to how this man acquired his property is not material to the issues. The manner in which this man acquired his property cannot affect it.

The COURT: I think I ruled on that matter in a question that was asked Col. Parker. Is not this for the same purpose, to show his wife aided him in the procuring of this property?

Mr. KINNEY: Yes.

The COURT: The objection is overruled.

Mr. DAVIS: We note an exception.

167 Mr. KINNEY:

Q. Have you any knowledge as to how the Lindsay lands were acquired by Mr. Notley?

A. Under lease originally from my wife's mother.

Q. What was the rental?

A. Seventy-five dollars a year.

Q. What are these lands bringing in rent?

A. About twenty-eight or twenty-nine hundred dollars a year.

Q. How is it they were acquired at seventy-five dollars a year?

A. Well, I had some idea of getting those lands myself; my attention was called to them by the fact they wanted to raise some money for some purpose, and my attention was called to the lease of those lands, and when

(End of Page 50 Official Transcript.)

I commenced to try to get those lands I found from Mrs. Notley, who was present, that she simply leased the lands over my head and left me out; that was at all events the excuse given me at the time;

it was a way of getting out of a verbal contract; the influence that was brought to bear——

Mr. STANLEY: I would like to move to strike out the statement of the witness as to the lands being leased to Mrs. Notley over his head, and that being a statement of seeking to avoid a verbal contract.

The COURT: I suppose it was a fact that the lands were leased over his head, but that portion of the answer may be stricken out and the jury are instructed to disregard that portion of the answer.

Mr. KINNEY:

Q. What did William Notley do at Paauilo?

168 A. He was head luna, he had charge of the labor, giving me his time returns as bookkeeper.

Q. He handled the getting of lands, etc.?

A. He did largely, and more especially in the handling of labor he had a great deal of influence over the younger Hawaiians, and in that way they were taken away from other plantations; they would ship with him, preferring to be under an Hawaiian.

Q. Was labor scarce or plentiful in those days?

A. Very, very scarce indeed; quite a competition for it.

Q. What was the character of labor on the plantation, by the boys in starting that plantation interest? Where did they get the seed to do that planting?

A. From Waipio; it was brought over on donkeys and mules.

Q. By whom?

A. By the boys, William especially, in the home; I rode on several occasions.

Q. Who did the carting and teaming between Paauilo and Waimea for the tannery?

A. Several parties engaged in it from time to time; my recollection is they were changed from time to time; it was pretty heavy work; Charles Notley did some of the

(End of Page 51 Official Transcript.)

teaming; it was ugly work; it was a very hot, long journey, eleven miles on a very bad road down hill, and back in the night.

Q. Did you know anything about the partnership formed by the old gentleman Notley?

169 A. I knew nothing of any articles of copartnership; it did not appear on the books I had, which were simply plantation books, but I had checks given me by the old man in his lifetime, signed C. Notley and Sons, drawn on Davies and Company of Honolulu. I left in 1883; it was about in 1882; one especially I recollect, it was a bonus given me for the handling of the Kukaiau lands case.

Q. Boundaries?

A. Yes; I came here in Hilo with Charles Notley; this Charles Notley who had assisted in the survey?

Q. Of which Kukaiau got a large tract?

A. All the upper portion of the land. Mr. Cecil Brown took the case in the Supreme Court; that may be in the November term.

Q. Who did the securing of witnesses and assisted in the survey?

A. William Notley—usually evidence was taken before Judge Hart. Charles Notley had gone with the surveyor James Gay to go over the whole part; he was well acquainted with the whole thing.

Q. Do you know this boy David?

A. When he was young I did; then he went to school to San Mateo in California; that is my recollection.

Q. When he came back what happened?

A. I was not on the plantation when he came back; I met him in Honolulu; he appeared to drift away.

Q. What was his condition?

A. Well, it was ordinary evidently.

Q. What was the condition of his clothing?

170 A. An ordinary dock laborer, that is what he drifted to.

(End of Page 52 Official Transcript.)

Q. What was his condition and social standing at the time he came from San Mateo.

A. I had very great hopes—I had considerable interest in the boy.

Mr. STANLEY: I object that the answer is not responsive to the question and that it be stricken out.

The COURT: The answer may be stricken out.

A. Well, he impressed me as a very gentlemanly young man.

The COURT: The answer may be stricken out.

Reporter reads last question.

Mr. BROWN: I agree that the question is immaterial and irrelevant. The condition, character and social standing has nothing to do with the undue influence of Mrs. Danford.

Mr. STANLEY: We object to the evidence, even though there is a promise to connect, as absolutely immaterial and irrelevant.

The COURT: The objection will be overruled, subject to be stricken out in the event that the contestant fails to connect with his theory of the case.

Mr. STANLEY: I note an exception, your Honor.

Exception allowed.

Mr. KINNEY:

Q. What was the condition—the social standing—of that young man, when he first came from San Mateo.

171 A. I do not know. All I know is his appearance, and conversation with him and his explanation to me of the medals that he won at school. He was clothed as a gentleman ought to be. He was respectably clothed, and spoke to me as one who had some education. I do not know the social standing. I do not know whom he associated with, except his father.

Q. How was Mr. Notley, Sr., in his susceptibility in connection with ladies?

Mr. STANLEY: I object to that, if the Court please, as being absolutely immaterial and irrelevant to the issue

(End of Page 53 Official Transcript.)

before the Court and jury now, and also on the ground as calling for an opinion of this witness.

The COURT: How would his susceptibility or lack of susceptibility as far as the family are concerned—how would that effect the proposition?

Mr. KINNEY: States to the Court what he expects to prove.

The COURT: I hardly think that question will reach that proposition. I do not think it is material at the present time.

Mr. STANLEY: I object to the counsel saying what he expects to prove.

Objection sustained by the court and the jury instructed to disregard the statement as to what counsel expects to prove.

Mr. KINNEY: I note an exception.

The COURT: Exception allowed.

172 Mr. KINNEY:

Q. Do you know whether or not Mr. Notley at any time previous to the arrival of Mrs. Danford had other young ladies in his home.

A. Yes.

Q. Who were they?

Mr. STANLEY: I object, if the Court please, to this. The presence of other young women in his home cannot be evidence of undue influence exerted by her over Mrs. Notley. I object to the question as immaterial and irrelevant to the issue.

The COURT: How do you propose to prove firmness or lack of firmness on the part of Mr. Notley? By proving that at various times previous to the time Mrs. Danford came to live with him he had young ladies living with him in his house?

Mr. KINNEY: I want to submit to your Honor—Why are they able to offer evidence to the jury of the firmness of Mr. Notley's character by a conversation and otherwise bring it out he is a firm man, and I cannot offer evidence why he is susceptible to the influence of ladies?

(End of Page 54 Official Transcript.)

The COURT: I do not know why that question was propounded to Dr. Herbert—perhaps because he is a medical man—but questions of that kind would assume the nature of a psychological question. The objection will be sustained. I do not see that the fact he had young ladies visiting at his house prior to 1885 would show his character in any way. You may note an exception, Mr. Kinney.

Mr. KINNEY: The only exception worth considering is the exception that I ought to be able to prove general characteristics.

173 Mr. KINNEY:

Q. Do you remember the visit Mr. Notley made to England in 1885?

A. I do; I saw him on his return. I did not see him when he was starting.

Q. Did you do anything besides see him on his return?

A. I had considerable conversation with him in Honolulu.

Q. What part of Honolulu?

A. Well, I saw him on several occasions within a couple of days. I was down from the other Islands and saw him repeatedly within the space of two or three days I remained in town.

Q. How would you find him?

A. Physically?

Q. No; mentally; his talk, rather, his conversation—his actions.

A. He usually spoke indiscriminately of his visit home; how much he enjoyed it; and the usual conversation after a trip of that character. It was a trip partly for pleasure and partly to obtain some process of cultivator, or something of the kind. The conversation was general in its character.

Q. Did he make any comment about home life, or life in the Islands?

A. I spoke generally on his conversation. He spoke, I think, saying that was the country to live in; how much difference there was between here and there, and how

(End of Page 55 Official Transcript.)

much more enjoyment a man could get for his money there.

Q. Did he refer to his family?

A. Not that I recollect.

174 (Page 56 Official Transcript.)

Cross-examination:

Mr. STANLEY: In order to save our rights, I now move without argument that all of the evidence given by this witness, Mr. Chillingworth, be stricken out, on the ground that it is all immaterial to the issue before the Court.

The COURT: I think I have already ruled on the proposition, and the same objection was made, although the motion was not made to strike out in the case of the testimony of Col. Parker, and, as I have already ruled on the proposition, I think we are taking up a lot of time in the matter. I think for the present the motion should be denied and I so rule. You will have the benefit of an exception.

Mr. STANLEY: I understand your Honor to rule that the motion is denied for the present?

The COURT: The motion is denied.

Mr. STANLEY: Then I note an exception to your Honor's ruling.

Exception allowed.

Mr. DAVIS:

How old are you Mr. Chillingworth?

A. Sixty-three, sir.

Q. You say that you remained three years in the employ of Mr. Notley as bookkeeper.

A. A little over three years.
Q. During what period?
A. From the latter part of 1879 to somewhere in 1882.
175 Q. Was there any trouble between Mr. Notley and his wife while you were in his employ?
A. In what way?

(End of Page 56 Official Transcript.)

Q. Any trouble of any kind. Were their domestic relations rotten?
A. They were at one time; their domestic relations were ruffled by the introduction into their home of two young Portuguese girls that came out with a shipment of contract laborers. No, there were no troubles that I know of.
Q. In Hamakua?
A. Not that I know of.
Q. You swear that you never heard of any other trouble between Notley and his wife?

Mr. KINNEY: I object. It is not what he heard, but what he knows.
The COURT: He would not be permitted to relate hearsay evidence.

WITNESS:

A. My recollection is simply this: that from my intimate acquaintance with Mr. Notley we had a little conversation as to the continuous residence of those two Portuguese girls in the house. The family relations were not strained.
Q. Did you know of anything during the time that you were employed?
A. I left there.
Q. After you returned?
A. I knew nothing.
Q. When did you leave there?
176 A. I went to Maui sometime in 1882.
Q. From 1882 to 1899, at the time of the execution of this will, you knew nothing of the private affairs of Mr. Notley and his wife?
A. Nothing whatever of their private affairs.
Q. And during the time of the trouble between the introduction of these Portuguese girls there was no trouble between Mr. Notley and his wife?
A. I did not live with them. There was nothing that came under my special observation. There might be lots of trouble, private, that I knew nothing about.
Q. You said that Mrs. Notley could not speak the Eng-

(End of Page 57 Official Transcript.)

lish language. That is the fact, isn't it? Her conversation was carried on entirely in native?

A. She would answer in native to a remark in English. It is a very comm·n thing with her—the same as other Hawaiian women.

Q. Did you ever hear Mrs. Notley speak in English?

A. I cannot say. I never had a conversation with her in the English language.

Q. Did you ever hear her speak in the English language—ask questions in English?

A. I never heard her ask questions in English that I recollect.

Q. Were you a constant visitor there; when you were bookkeeper there did you go to the table frequently?

A. For nearly two months I took all my meals there.

Q. What was the trouble about the Portuguese girls?

177 A. They were made guests instead of servants. He is a dead friend of mine and I do not want to——

Q. (Int.) They have resurrected the dead to set aside this will. Give us the story.

A. I would like you to put a question so that I can answer it.

Q. What was the trouble? Was Mrs. Notley jealous of these girls?

A. She objected on the ground that they were made too much of in general treatment and demeanor—made close personal attendants to the old gentleman.

Q. How far did the trouble go?

A. So that I spoke to Mr. Notley about it. He complained of the trouble or something through those girls there. I told him "Well, perhaps you know what people think and say—perhaps some of it got to the old lady's ears. She naturally feels annoyed." He said "You know there is nothing wrong." I said "I am not Mrs. Notley though." Mrs. Notley never spoke to me about her husband, under any circumstances.

(End of Page 58 Official Transcript.)

Q. How did you know there was trouble between herself and her husband?

A. The first from Mr. Notley. Then there was an apparent coolness. Those girls would sit there and Mrs. Notley would decline to come in.

Q. He didn't make any will while the Portuguese girls were there.

A. I didn't write any.

Q. How long were the girls there?

178 A. One of them got married after a time and I think the other one was sent to the parents. She was finally sent away from the house, I know. She was sent down to the quarters where her parents were.

Q. Who were the white people that came to the house at the time, Mr. Chillingworth, while you were there as bookkeeper?

A. Almost a daily occurrence for white people to come there and be entertained—always asked to stop for dinner.

Q. Was Mrs. Notley always at the table?

A. My recollection is this: If it was a hurried meal, ahead of the regular hours, she would make something out for a man and he would eat alone.

Q. Was not that his habit, to eat alone—Mr. Notley—when there were no strangers there?

A. No, sir; positively no.

Q. When strangers were there was Mrs. Notley at the table?

A. That is my recollection.

Q. Are you sure about it?

A. If you state any occasion and ask me the question I will answer you.

Q. State generally.

A. As a general thing she was not absent from the table.

Q. Are you positive as to that?

A. Yes; I am positive, so far as it came under my observation. I didn't eat there every day. I didn't eat there

(End of Page 59 Official Transcript.)

179 at the time of every visitor being there, but the occasions I was there I can speak of.

Q. Mrs. Notley was always at the table?

A. Well, nearly always.

Q. But not always?

A. There may have been an occasion. I took a general impression.

Q. Did you have any conversation with Mr. Kinney before you left Honolulu with reference to this case?

A. No, sir.

Q. At any time?

A. Not that I recollect.

Q. How did you know you were going to be a witness in this case?

A. A subpœna was served on me at three o'clock on Monday.

Q. Did Mr. Kinney ever speak about your being subpœnaed as a witness on the case?

A. I did not know I was going to be subpœnaed.

Q. About the execution of this will you knew nothing?

A. I never knew there was a will until I saw it in the paper.

Q. And as to what Mr. Notley's relations were from 1882—that is seventeen years ago—from that time down to 1892 you knew nothing of the domestic relations of Charles Notley?

A. Absolutely nothing of my own knowledge.

Q. Is your wife a relation of Mrs. Notley, Mr. Chillingworth?

180 A. There is some distant relationship through my wife's grandmother. That is how it has come to me. It is not a relationship that I could classify.

Mr. KINNEY: I will now ask, if the Court please, what was the general character of Mr. Notley in reference to young ladies' society, his susceptibility or not. State simply the general characteristic.

A. I think he enjoyed ladies' society.

Q. Preferred to say "yes" rather than "no" to the ladies?

(End of Page 60 Official Transcript.)

A. I could not well answer that question.

The COURT: Witness has stated that he could not well answer that question.

Mr. STANLEY: Was it anything unusual that he would be fond of the young ladies' society? Well, it was marked in this way; some men are crusty—do not want ladies about the house. In his case he was especially affable, courteous and attentive?

Q. It came from his Irish blood, didn't it?

A. I don't know; I am not acquainted with that.

(Page 62 Official Transcript.)

Mrs. MARIA HUGHES, sworn on behalf of the contestants, testified as follows:

Mr. KINNEY: Are you acquainted with your father's handwriting?

A. Yes, sir.

Q. Did you receive letters from him?

A. Very frequently.

181 Mr. KINNEY: I introduce these (holding letters) simply to show his relations with his family during these years, 1883, 1884, 1885, just preceding the three years preceding the arrival of Mrs. Danford. I ask the witness to identify these. (Showing witness letter.)

A. Yes; that is my father's handwriting.

Q. Signature and all?

A. Yes.

Mr. KINNEY: I wish to introduce that letter, dated November 14, 1883, in evidence.

Mr. STANLEY: I object to it. It is a letter purporting on its face to show that the father was kind and wrote to his own children. What has that to do with the question of undue influence, when he wrote these letters in 1883?

The COURT: I think it is to show the relations existing between the testator and his family prior to the definite influence. It does not appear that undue influence was shown by the act or a series of acts.

Mr. KINNEY: This is not to show undue influence, but merely the relationship.

The COURT: On what ground do you object to it?

Mr. DAVIS: I object to it on the ground that it is not material to the issue involved and that the evidence ought to be excluded.

The COURT: I think I have already ruled on that objection.

Objection is overruled.

182 Mr. STANLEY: We note an exception, your Honor. Exception allowed.

(End of Page 62 Official Transcript.)

The COURT: It may be received in evidence and marked Contestants' Exhibit 2.

(See Appendix page 489 post.)

Mr. Kinney reads letter.

Mr. KINNEY:

Q. I will ask you to identify the handwriting and signature of the letter.
A. It is my father's handwriting and signature.

Mr. BROWN: The same objection.
The COURT: The same objection, same ruling and exception allowed. It may be received in evidence and marked Contestants' Exhibit 3.

(See Appendix page 490 post.)

Mr. Kinney reads letter dated October 31st, 1884.

Mr. KINNEY:

Q. Who is the "Johnnie" referred to there?
A. John Notley.
Q. The boy in Court?
A. Yes, sir.
Q. The oldest son of Charles Notley?
A. Yes.
Q. And Victoria and Maria present in Court?
A. Yes.
Q. One of the daughters of Charles Notley?
A. Yes.

183 Mr. KINNEY: I introduce in evidence a letter dated Hawaii, Paauilo, July 10, 1884.
Mr. STANLEY: The same objection, your Honor.
The COURT: The handwriting has not been identified.

Mr. KINNEY:

Q. Whose handwriting is that (showing witness letter.)
A. Father's handwriting and signature.

The COURT: Same objection, and the same ruling and exception. It may be received in evidence and marked Contestants' Exhibit 4.

(See Appendix page 491 post.)

Mr. Kinney reads letter.
Mr. KINNEY: I offer in evidence letter dated October 23, 1884.

Q. I will ask you in whose handwriting that is.
A. It is father's handwriting and signature.

The COURT: Same objection, same ruling and ex-

(End of Page 63 Official Transcript.)

ception allowed. It may be received in evidence, and marked Contestants' Exhibit 5.

(See Appendix page 492 post.)

Mr. Kinney reads letter.

Mr. KINNEY: I offer in evidence letter dated Paauilo, September 18, 1884.

Q. I will ask the witness whose handwriting that is.
A. It is father's handwriting and signature.

184 The COURT: Same objection, same ruling and exception allowed. The letter may be received in evidence and marked Contestants' Exhibit 6.

(See Appendix page 493 post.)

Mr. Kinney reads letter.

Q. You are the daughter of Charles Notley, deceased?
A. Yes.

Mr. KINNEY: I offer in evidence letter dated August 13, 1885, at Shulin's Cottage, Edgeware, Middlesex. I ask the witness in whose handwriting that is.
A. Father's handwriting and his signature also.

The COURT: Same objection to this, gentlemen?
Mr. STANLEY: Yes, your Honor.
The COURT: Same objection, same ruling, and exception allowed. It may be received in evidence and marked Exhibit 7.

(See Appendix page 494 post.)

Mr. Kinney reads letter.

Mr. KINNEY: I wish to introduce in evidence letter dated July 14, 1885, Shulin's Cottage, Edgeware, Middlesex. I will ask the witness in whose handwriting it is.
A. It is father's handwriting and signature.

The COURT: Do you offer it in evidence?
Mr. KINNEY: Yes, your Honor.
Mr. STANLEY: Same objection, your honor.

185 The COURT: Same objection, same ruling and exception allowed. It may be received in evidence and marked Contestants' Exhibit 8.

(See Appendix page 496 post.)

Mr. Kinney reads letter.

(End of Page 64 Official Transcript.)

Mr. KINNEY: I wish to introduce a letter dated June 18, 1890.

Q. I ask the witness in whose handwriting that is?
A. It is father's handwriting and signature.

Mr. STANLEY: Same objection.
The COURT: Same objection and ruling and exception allowed. It may be received in evidence and marked Contestants' Exhibit 9.

(See Appendix page 497 post.)

Mr. Kinney reads letter.
Mr. KINNEY: I wish to introduce in evidence letter dated Paauilo, September 21, 1899, together with the envelope.

Q. I will ask in whose handwriting that is?

A. It is my father's handwriting and signature.

Mr. BROWN: Same objection.

The COURT: Same objection, ruling and exception allowed. It may be received in evidence and marked Contestants' Exhibit 10.

186 (See Appendix page 499 post.)

Mr. Kinney reads letter.

Mr. KINNEY: I call attention to the option (?) dated August 25th, 1899. I put in evidence also the envelope bearing stamp September 22, 1899, and addressed to William Notley, Kalaupapa, Molokai.

Mr. BROWN: Same objection.

The COURT: Same objection, ruling and exception allowed. It may be introduced in evidence and marked Contestants' Exhibit 11. (See Appendix page 500 post.)

Mr. KINNEY: I simply called this witness to identify these letters and ask leave to recall her later as a witness on these general matters.

The COURT: We will now adjourn until tomorrow morning at 9 o'clock.

Adjournment here taken at 9:50 p. m., the court first admonishing the jury not to talk of the case either among themselves or to anyone else.

(End of Page 65 Official Transcript.)

SATURDAY, *January* 24, 1903—9 a. m.

Jury and all parties present.

Continuation of examination of Mrs. MARIA HUGHES, previously sworn.

187 Mr. KINNEY: I will introduce in evidence letter from Charles Notley to William Notley, dated September 7th, 1898.

Q. In whose handwriting is that?

A. That is father's handwriting and signature.

Mr. BROWN: Same objection.

The COURT: Same objection, same ruling and exception allowed. It may be received in evidence and marked Contestants' Exhibit 12. (See Appendix page 500 post.)

Mr. KINNEY: And also the envelope.

Mr. Kinney reads letter.

Mr. KINNEY: Also the envelope, stamped Kaunakakai, September 13, 1898.

Mr. STANLEY: Same objection.

The COURT: Same objection, ruling, exception and allowance. It may be admitted in evidence and marked Contestants' Exhibit 13. (See Appendix page 501 post.)

Mr. KINNEY: I introduce in evidence letter from Charles Notley to his son William Notley, dated Paauilo, May 16, 1901.

Q. I ask witness in whose handwriting and signature that is?

A. It is father's handwriting and signature.
Q. On the envelope?
188 A. His writing.

Mr. STANLEY: Same objection.
The COURT: Same objection, ruling, exception and allowance. It may be received in evidence and marked Contestants' Exhibit 14.
(See Appendix page 501 post.)

Mr. Kinney reads letter.

Mr. KINNEY: I introduce in evidence letter from Charles Notley to his son William, dated Paauilo, June 18, 1891, also the envelope enclosing the same.
Q. I will ask witness in whose handwriting and signature it is.
A. It is father's handwriting and signature.

Mr. BROWN: Same objection.

(End of Page 66 Official Transcript.)

The COURT: Same objection, same ruling and exception allowed. The envelope also may be introduced in evidence and marked Contestants' Exhibit 15.
Mr. Kinney reads letter.
(See Appendix page 502 post.)

Mr. KINNEY: I have to offer in evidence certified copies of certain deeds, wherein Charles Notley, Sr. dealt with his property under the name of "Charles Notley & Sons."
Mr. BROWN: We object to the introduction of this evidence as immaterial and irrelevant and not bearing upon the question of undue influence.
The COURT: What are the dates?
189 Mr. BROWN: The dates are May, 1883; August, 1884; and December, 1883.
The COURT (to Mr. Kinney): You are going to show subsequently that they did as a matter of fact surrender?
Mr. KINNEY: Yes. The deed is not of record. I do not know why.
Mr. BROWN: There is nothing of record giving them one single entry to any of the property.
The COURT: The only proposition is this: If counsel fails to more intimately connect all the testimony that has gone in thus far, with the fact that undue influence of some kind was exercised in the execution of this will, it should all be irrelevant and immaterial and may be stricken out on motion, but until it becomes apparent no connection is made I think the objection should be overruled.

Mr. BROWN: We note an exception.
Mr. KINNEY: I will introduce in evidence letter dated Honolulu, Senate Chamber, July 25th, 1895, from Charles Notley to his daughter, Mrs. Maria Hughes, and ask witness in whose handwriting that is.
A. That is father's handwriting.

Mr. STANLEY: Same objection.

(End of Page 67 Official Transcript.)

The COURT: Same objection, same ruling and exception allowed. It may be received in evidence and marked Contestants' Exhibit 16.

190 (See Appendix page 503 post.)

Mr. KINNEY: I will now introduce in evidence certified copy of lease from Charles Notley, Sr., of Hamakua, party of the first part, to John M. Horner & Sons, parties of the second part, dated the 1st day of May, 1883, duly recorded in the Registry of Deeds, Book 84, pages 446 and following.

Mr. BROWN: That is one that has been objected to before. I renew the objection now.

The COURT: Same ruling, exception and allowance. This may be received in evidence and marked Contestants' Exhibit 17.

(See Appendix page 504 post.)

Witness here leaves the stand by permission of the Court. Mr. Stanley is to have the privilege of cross-examining her later.

Mr. KINNEY: I will introduce in evidence deed from Samuel Parker of Mana, Hamakua, Territory of Hawaii, to Charles Notley & Sons of Hamakua.

Mr. BROWN: Same objection.

The COURT: Same objection, ruling and exception allowed an it may be received in evidence and marked Contestants' Exhibit 18.

(See Appendix page 508 post.)

Mr. KINNEY: I introduce in evidence deed dated in 1st day of December, 1883, to Charles Notley—an indenture made be-
191 tween Charles Notley & Sons, parties of the first part of Hamakua, to John M. Horner & Sons, parties of the second part.

Mr. BROWN: Same objection.

The COURT: Same objection, ruling and allowance. The instrument offered may be introduced in evidence and marked Contestants' Exhibit 19.

(See Appendix page 510 post.)

Mr. Kinney reads indenture.

Mrs. Hughes here again takes the stand.

(End of Page 68 Official Transcript.)

1902.

Cross-examination:

Mr. BROWN: Mrs. Hughes, when these letters that you identified as having been written to you by your father were received by you, where were you residing at that time?

A. In Honolulu.

Q. How long had you been residing there?

A. I can't say how long.

Q. Six months? (No answer.)

Q. All these letters that were addressed to you that you identified, in 1883 and 1884?

A. I was in Honolulu.

Q. How long had you been residing there?
A. About a year, I think.
Q. That is a year in 1883. The letters are dated 1883 and 1884.
192 Mr. KINNEY: It seems to me it should be—"How long are you residing."

Mr. BROWN:

Q. Exhibit 2, letter dated November 14, 1883. When you received that from your father how long had you been residing in Honolulu?
A. About six months.
Q. So you went to Honolulu about May, 1883?
A. I went to Honolulu in the last of March, 1883.
Q. What was the occasion of your going there?

Mr. KINNEY: I submit, may it please the Court, that this is not cross-examination. We had put someone on the stand to identify the letters. The cross-examination should be limited to the matter brought out on the direct. It was merely the identifying the handwriting of the letters, to whom addressed, and by whom signed. The letters speak for themselves. The point is that a person is called to the stand to go through the form of identifying certain signatures, etc. I am going to put her on the stand later. You will have a chance then to examine her.

(End of Page 69 Official Transcript.)

Mr. BROWN: Then I will withdraw that question if we have an opportunity of examining her later.

(Page 71 Official Transcript.)

Mrs. EMMA NOTLEY, sworn on behalf of the Contestants, testified as follows:

Mr. KINNEY:

Q. Mrs. Charles Notley, where is your home now?
A. At the present time?
193 Q. Your real home? Where you live?
A. Hamakua, in the District of Hamakua.
Q. Where have you lived during the last few years?
A. In Honolulu.
Q. Are you married?
A. Yes.
Q. To whom?
A. To Mr. Charles Notley, Jr.
Q. When were you married to him?
A. In 1877.
Q. Where were you married?
A. In Hamakua.
Q. What part of Hamakua?
A. Paauilo.
Q. In whose house?

A. In my father-in-law's house.
Q. Charles Notley, Sr.?
A. Yes.
Q. How old was your husband when you were married to him?
A. A little over 15, I think.
Q. How old were you?
A. I think I was about 16.
Q. Where was the old gentleman when you were married?
A. There at the wedding.
Q. Where had been your home just before you were married?
A. I was living in Waimea.
194 Q. When did you first know the Notleys?
A. In 1874.
Q. Where were you living then?
A. In Waimea.
Q. Did you know them before they went to Hamakua?
A. Yes.
Q. At the time you married Charles Notley what was he doing?
A. In Hamakua?
Q. Yes?
A. Ranching.
Q. You were married in 1877?
A. Yes, sir.
Q. How soon after that did Mr. Notley, Sr. go into the cultivation of cane, with reference to your marriage?

(End of Page 71 Official Transcript.)

A. It was in the fall of the same year.
Q. Who were the members of the family at the time he started? Who was there present at the time?
A. Mr. Notley and my husband, Charles Notley, his two oldest sons, wife and daughter and myself.

Mr. STANLEY: For the sake of saving our rights, I make the objection which I intend to submit without argument to any line of examination as to what any members of the family were doing prior to the arrival of Mrs. Danford in the county in 1885; if your Honor will allow this objection.

The COURT: It is understood that the objection shall apply to all this line of examination and that the same ruling, objection and allowance shall be had to every question, whether the objection
195 is repeated after each question or not.

Mr. STANLEY: My objection is that it is immaterial and irrelevant to the issue raised in the pleadings here.

The COURT: It is understood that that objection shall apply to all questions along this line and that the proponent shall have the benefit; that the same ruling and exception shall be had and the same ruling and exception allowed to each question, as if the objections were put to each question.

Mr. KINNEY: When you refer to the daughter of Charles Notley, whom do you mean?

A. Mrs. Hughes, now present in court here.
Q. After you were married where did you go?
A. To live with Mr. Notley.
Q. Why?
A. Because he wanted his son to be there.
Q. How do you know that?
A. He told me because I was married to his son I was not to take him from home.
Q. You say the cane business was started in 1887. Who did the grinding of the cane?
A. In 1877?

(End of Page 72 Official Transcript.)

Q. Who was to do it?
A. Mr. T. H. Davies.
Q. Did he have a mill?
A. Had a mill put up?
Q. So that Mr. Notley was simply doing the planting?
A. Yes; planting.
196 Q. What was your husband's work after his marriage and after the cane planting was started?
A. He was a luna with the plows in the field.
Q. What was William's work?
A. He was a bookkeeper.
Q. Anything else?
A. Also he worked outside.
Q. Who attended to the work in the house?
A. Mrs. Hughes.
Q. What did she do?
A. The cooking and the cleaning of the house.
Q. What did you do?
A. I helped my mother in washing and ironing and other duties. I mean Mrs. Notley.
Q. Where there any other people at the house beside the family?
A. Yes; a blacksmith and two carpenters.
Q. Who did the washing for those people?
A. My mother-in-law and myself; my cousin and Mrs. Notley.
Q. Did the family have any servants at the time that the cane planting was started?
A. No servants in the house then.
Q. How long before you commenced to have servants?
A. I think it was in 1882.
Q. When did the daughter marry?
A. In 1881.
Q. To whom?
A. Mr. Thomas Hughes.
Q. After their marriage where did they live?
197 A. They left for the mill.
Q. How long did they stop there?
A. I can't remember.
Q. Was it many years?

A. I don't think it was.
Q. From there where did they go?
A. They went to Honolulu.
Q. How long did William remain at home?
A. William Notley?
Q. Yes; Mr. William Notley, the oldest son?

(End of Page 73 Official Transcript.)

A. He always remained with us until he left the Islands, in 1883.
Q. To go where?
A. To Scotland.
Q. Where was David when the cane planting was started?
A. He was home.
Q. Where was Tom Notley?
A. He was home in the year I got married, in 1877.
Q. And he died when?
A. The same year.
Q. While down at school?
A. Yes.
Q. Was David with him?
A. David was with him.
Q. What, if anything, did David do on the plantation when he was there?
A. He was sent out to plant trees.
Q. That alone?
198 A. That is probably while he was there in 1877.
Q. After that what work did he do on the place, in 1877, 1880, 1881 or 1882?
A. Going into the field with the men.
Q. Bossing or doing the work himself?
A. Doing the work himself.
Q. You say William went away in 1883? From 1879 to 1883, what did William do?
A. At the time he was away?
Q. No; up to the time he went away.
A. He was keeping books and when we had a bookkeeper he entirely went into the field as a luna.
Q. You say he went to Scotland in 1883?
A. Yes.
Q. When did he return?
A. In that same year; in the summer of that year he returned.
Q. What was his condition?
A. I do not know on what occasion he went to Scotland.
Q. When he came home what was his condition?
A. We were told he was a leper.

(End of Page 74 Official Transcript.)

Q. After that where did he remain?
A. In the yard in a house to himself.
Q. How many years did he remain in the yard in a separate house? Until what year?

A. 1887.
Q. And then after that where did he go?
A. He was taken to Honolulu.
Q. And from there where?
199 A. To the Leper Settlement, in Molokai.
Q. Was he married?
A. Yes; he was married.
Q. When did he marry?
A. I think in the fall of the same year that he returned.
Q. When a leper?
A. Yes; when a leper.
Q. Whom did he marry?
A. My sister Merlisea.
Q. Is she living now?
A. Yes.
Q. With him?
A. Yes; with him.
Q. Did William do any more business after he returned?
A. Just a little; what is asked him to do around the place.
Q. Did he remain in exclusion?
A. Yes.
Q. When he returned do you know whether or not he had—whom did he visit in England?
A. His grandfather and uncle.
Q. Did you hear any talks between William and his father in reference to these visits to the relations in England?

Mr. DAVIS: I object on the ground that this evidence is hearsay and immaterial as to any conversation they had about the relatives.

200 Mr. KINNEY: Well, did you hear them talk?—William and the old man?—Talk about relations in England.

Mr. STANLEY: I object to that evidence, on the ground that it is immaterial.

The COURT: As I understand this, it is not to call for the conversation; merely the fact of the talk.

(End of Page 75 Official Transcript.)

Mr. STANLEY: It is all covered by my objection, your Honor.
The COURT: Yes, as a general objection.

Mr. KINNEY: Did you hear them talk about relatives in England?
A. Yes.

The COURT: That might not be covered by your objection, if it was subsequent.
Mr. STANLEY: It is prior to 1895, your Honor.

Mr. KINNEY:

Q. How long did the old gentleman remain at Hamakua?
A. Until his present death.
Q. Did he go to foreign lands ever?
A. Yes, he went to England.

Q. In what year did he go? Was it before or after this talk about relatives?
A. He went to England in 1885.
Q. That was after this talk about relatives?
A. Yes.
Q. Did he go with anyone or alone?
201 A. He went alone.
Q. Who were agents for his planting interests?
A. Mr. Theo. H. Davies.
Q. When he went away what became of your husband and the other boys?
A. We were still on the plantation.
Q. Was David there?
A. Yes.
Q. What was David doing when the father went to England?
A. He was a teamster.
Q. How long did your father-in-law remain away?
A. Six months.
Q. He returned when?
A. In the fall of the same year.
Q. 1885?
A. Yes.
Q. Did he bring anyone with him?
A. Yes; Mrs. Danford.
Q. Up to the time that your father left for England what was the maiden name of the niece at that time?
A. Miss Emma Mullinger.
Q. Up to the time your father went to England had you heard that there was any such person?
A. No, never.

(End of Page 76 Official Transcript.)

Q. Did you know he was bringing his niece with him?
A. No.
Q. When did you first learn she was coming?
A. When they arrived in Honolulu.
202 Q. At the time that your father left for England who were the members of the family?
A. The widow Mrs. Notley and myself, and my two children, Johnny and Kaala, and Mr. Notley and Mr. Keyworth.
Q. Living in the house?
A. Yes, in the house; the main building we always lived in.
Q. Is that main building now as it was then?
A. No; it has some added on now.
The COURT: That is Mr. Keyworth that you refer to—Davies & Co.'s representative?
A. Yes.
Mr. KINNEY: So that at the time he left for England your first two children were born?
A. Yes.
Q. Of course your husband was there, and David Notley?

A. Lillie, the three children—No, Lillie was not born—I am mistaken; excuse me.

Q. Where was David—He was there?

A. Yes.

Q. What were the relations of the family amongst themselves before your father went to England?

A. Very loving; always on good terms.

Q. Did the old gentleman live in the main house, too?

A. Yes.

Q. How was his treatment of your children?

A. He was very kind to them.

203 Q. In what way did he show it?

A. Well, in taking them up; putting them to sleep himself and putting them to bed, without speaking to me a word that I could come to take the baby up, and put it to bed if it falls asleep in his arms; he would put it in bed himself; he would do that frequently.

Q. Where were the evenings spent?

A. In the parlor.

(End of Page 77 Official Transcript.)

Q. By whom?

A. Mr. Notley and his two grandchildren, myself and Mr. Notley.

Q. Members of the family?

A. Yes, and Mrs. Notley.

Q. What doing?

A. Sitting around and talking, and sometimes there would be singing. He would ask his son Charley to sing for him; or playing with the grandchildren.

Q. Now, speaking of the two or three years preceding his visit to England, was there any entertainment done of strangers at your home; at the family home?

A. Yes.

Q. Who?

A. Do you mean when he returned from England?

Q. No; these two or three years before; 1883 or 1884, or 1885. Were people entertained at the house?

A. Yes; Mr. Parker, Mr. Spreckels, Mr. Irwin, and Minister Kapena.

Q. Any others that you happen to think of?

A. Major Mohenua.

Q. Anyone else that you happen to think of?

A. There were Mr. Widdifield, Mr. Gibson and Judge
204 Austin, and Judge McCully, Mr. Severance and D. H. Hitchcock and wife.

Q. Were there Hawaiians as well as foreigners entertained at his table?

A. Yes; there was Judge Kaaekuahiwi, Judge Helemanu, Judge Hart, Judge Waiau and Sheriff Sanford.

Q. Were there any other Hawaiians that you remember? Judge Helemanu and you say Kaaekuahiwi?

A. There was the parson of the district, J. N. Keloha.

Q. How would he treat his Hawaiian guests?
A. Same as he would treat his other guests.
Q. On whose invitations would these Hawaiians come?
A. They would call and visit.
Q. How would they come to the table?

(End of Page 78 Official Transcript.)

A. By invitation of Mr. Notley.
Q. Did you have many friends among the Hawaiians?
A. Yes.
Q. Did he visit them?
A. Occasionally he would visit them.
Q. Whom?
A. There was Mr. Haina; he was sort of lame——
Q. Did he make any visits around the Island at all—the old gentleman—to Waimea, Kawaihae or Kohala?
A. Yes.
Q. When he was going on these visits——
A. (Int.) He called on his acquaintances.
Q. What nationality?
A. Hawaiians.
Q. Have you seen that yourself?
A. Yes; I have seen that myself.
Q. What have you seen?
205 A. Well, taking me there, and he introduced me to those Hawaiian friends of his. That is, how I came to know his people as he went along the district.
Q. How was he regarded by Hawaiians?
A. In a very warm way; in a loving way.
Q. Did he have any more expensive entertainment—that is receiving guests? He had parties?
A. We have had parties.
Q. When?
A. Christmas and New Years.
Q. Any other days?
A. Sometimes his children's birthdays.
Q. Who would be invited to those parties?
A. Foreigners and his Hawaiian friends.
Q. Many or few?
A. As many as could come to the party.
Q. Who entertained?
A. Mrs. Notley and Mr. Notley.
Q. How frequently would he give these entertainments?
A. Not very often.

(End of Page 79 Official Transcript.)

Q. Well, during the year how frequently would it be?
A. Two or three times in a year.
Q. Where did Mrs. Notley eat?
A. At the table.

Q. Always?
A. No; when she was not pushed with work.
Q. At any other time she would eat by herself?
A. Sometimes.
Q. What would that be for?
A. When she has her Hawaiian food.
206 Q. When these guests you speak of—Mr. Spreckles, Mr. Irwin, Mr. Severance, Mr. Austin, etc.,—came to the house, who entertained them?
A. Maria Notley and Mrs. Notley.
Q. She was not married then?
A. No.
Q. Who did the introducing?
A. Mr. Notley.
Q. Whom did he introduce?
A. The guests that were coming to the house.
Q. Whom did he introduce these guests to?
A. Mrs. Notley, his wife, and his daughters and myself.
Q. Do Hawaiians visit—I will ask you—you say that in 1885 when Mrs. Danford arrived you were at the home at Paauilo?
A. Yes.
Q. How long did you and your husband remain there?
A. About five months.
Q. That is, she arrived in the fall of 1885 and you remained there five months?
A. Yes.
Q. When she came—where did you go then?
A. We went across the gulch to Mr. Lindsay's cottage.
Q. When the niece arrived had you any intention of going away from home?
A. No.
Q. How long did you remain across the gulch, to the best of your recollection?
A. Two months.

(End of Page 80 Official Transcript.)

Q. Then where did you go?
207 A. We were called back to the old home.
Q. Where did you live?
A. In the main building, with the old folks.
Q. That would bring it into 1886?
A. In 1887.
Q. In the fall of 1885, Mrs. Danford arrived?
A. Yes.
Q. And then in 1886, or six months after her arrival, you moved across the gulch and stayed there about two months, or so?
A Yes.
Q. And then came back and stayed until what year, to the main house?
A. In 1887, in the month of January.
Q. What did you do then?

A. In the house?
Q. What was done in the month of January, 1887?
A. I did the cooking.
Q. You say something happened in January, 1887. What was that?
The COURT: You came back to the main house in 1887?
A. Yes.
Q. Where did you come from?
A. From Lindsay's cottage, where we were living.
Q. Was that in January, 1887, when you came back to the main house again?
A. Yes.
Q. How long did you remain the second time?
A. It was two months and three weeks.
Q. Then where did you and your husband go?
A. To Honolulu.
208 Q. That would be in 1887, in the spring of 1887?
A. Yes, in 1887.
Q. How long did you remain in Honolulu?
A. We remained until the fall of 1887.
Q. What did you do then?
A. My husband was called as a surveyor by the Government to lay out homesteads.
Q. Where?
A. At Honokaa, in the Hamakua District.
Q. When your husband went to Honolulu what was his employment?
A. With the surveying department.

(End of Page 81 Official Transcript.)

Q. How did he come to be doing surveying work?
A. Well, he sent in an application to Minister Aholo.
Q. Before that did he do surveying?
A. No, he was an engineer on the steam plows.
Q. How did he come to learn about surveying?
A. He learned a little from Mr. James Gay.
Q. What was he doing in Hamakua?
A. Surveying the whole of the Ahupuaa of Kukaiau.
Q. And Charles Notley was with him?
A. Yes; and he went to Honolulu.
Q. In the fall of 1887 you returned to Hamakua? Did you go with him?
A. No.
Q. When did you go?
A. I was in Honolulu at the time; he came up with Mr. Brown.
Q. What happened after that?
A. Well, the old gentleman sent my mother-in-law to come down to get me and the children.
Q. Did she come down and get you?
209 A. Yes.
Q. And brought you up to where?

A. Up to their home.
Q. And you lived where?
A. In the same home with him.
Q. In the main house?
A. Yes; in the main house.
Q. That was in the fall of 1887? How long did you remain at home that time?
A. We were three months in the place, when we had to go to Lindsay's cottage again across the gulch.
Q. Why do you say you had to go?
A. Because there was trouble arose at the time.
Q. You say you had to go again?
A. Yes.
Q. When was the first time that you had gone?
A. In 1886.

Mr. STANLEY: I object to leading the witness. She had not testified that she had to go before; she said she moved.

(End of Page 82 Official Transcript.)

Objection sustained.
Reporter reads last question and answer.
Mr. KINNEY: Your Honor will withdraw the ruling? May it be stricken out?
The COURT: The ruling is withdrawn, in view of the fact. I did not know she had so testified.

Mr. KINNEY: What makes you say you had to go?
A. Because there was a little trouble in the family.
210 Q. How did that make you go?
A. My mother-in-law and my father-in-law had——
Q. (Int.) Never mind what was said. Why did the trouble——
The COURT (Int.): What were you going to say?
A. Because we were ordered out of the place by my father-in-law.
Mr. KINNEY: When was the first occasion Charley Notley ordered his son out of his home?
A. In the fall of 1886.
Q. When was the second time he ordered him out?
A. Near the Spring of 1887—I mean 1888; near the spring of 1888.
Q. How was it that you came to go back when you were ordered out? The first time how did you come to go back? Who came for you?
A. Mr. Notley himself asked us to go back to the main house.
Q. Was that the first trouble, in 1886?
A. Yes.
Q. How did you come—And in the spring of 1888 he ordered you out again and you went across the gulch to Lindsay's?
A. Yes.
Q. How did you come to go back again?
A. He called Mr. Notley over—his son.
Q. What date was that?

A. That I cannot remember.
Q. Well, how long had you been at the Lindsay's, do you think?
A. At the second leaving?

(End of Page 83 Official Transcript.)

Q. Yes.
A. Four days.
211 Q. Then you remained in the main house until when?
A. No; we moved in the cottage. It was the week after we crossed; we lived in the cottage then.
Q. So that was the first time you lived outside of the main house?
A. Yes, the first time.
Q. It is true or not that your husband and you lived in the main cottage, lived in the main house, until your husband had trouble in Hilo?
A. Yes.
Q. Yes what?
A. We were in Honolulu then.
Q. Is it true that your husband and you always——

Mr. DAVIS (Int.): I object to any leading.
The COURT: What is the occasion of excluding witnesses from the court-room if you are assuming that they know all that is testified to by Mr. Lydgate or anybody else. The foundation should be laid as to whether the witness knows of any trouble.
Objection sustained.

Mr. KINNEY: You say that you and your husband moved into the cottage when you went back the last time?
A. Yes.
Q. Did you ever before that live in the cottage?
A. No.
Q. At that time who was living in the main house?
A. Mr. Notley, Mrs. Notley and Miss Mullinger.
Q. How long did you remain in the cottage—you and your husband, at the time?
A. It was 8 months.
212 Q. Then where did you go?
A. Moved back to Honolulu again.
Q. When next did you go to the family again?
A. Not until 1895.
Q. What year would that be that you went to Honolulu in?
A. From Hamakua?

The COURT:

Q. Yes, when you lived 8 months in the cottage?
A. 1889.
Mr. KINNEY: It should be what month in 1889?

(End of Page 84 Official Transcript.)

A. It must have been July or August.
Q. Then you went back there in 1895 in what month?

A. In August.
Q. With your husband?
A. Yes.
Q. Where were the children?
A. I had already taken them there for a vacation.
Q. Where did you two live then?
A. When I went back in 1895?
Q. Yes.
A. In the cottage.
Q. Which cottage?
A. It was the ironing house for my mother-in-law.
Q. Who was occupying the cottage you had had in 1889?
A. A Japanese doctor.
Q. Did you continue to remain in the ironing house?
A. Yes.
Q. Until how long?
213 A. Until 1889.
Q. Who occupied the cottage during that time; that is the cottage where you had lived in 1889?
A. They had the steward boy there and the cook.

(End of Page 85 Official Transcript.)

Mr. KINNEY:

Q. Did your residence there after 1895—How long did you remain at the home after you returned there in 1895?
A. Up to 1899.
Q. In what month in 1899?
A. March.
Q. Where did you live then?
A. Mr. Notley was in Honolulu at the time and he wrote to me that he was ill.
Q. When had he left?
A. I left in April; he left in March.
Q. Why did he leave in March?
A. I think he went to seek some money to help him in his coffee planting.
Q. So that you have resided at the home since Mrs. Danford returned, part of 1886, part of 1887, 1889, and from 1895 to the spring of 1899?
A. Yes.
Q. Did the parties such as the old gentleman used to give prior to 1895 continue after the arrival of Mrs. Danford?
A. No.
Q. Say the parties where foreigners and Hawaiians were invited?
A. No.

214 Mr. DAVIS: I object to this. He is leading right along.
The COURT: I think that is proper. It is a fact she herself testified to. The objection will be overruled.
Mr. DAVIS: I except to your Honor's ruling.

A. No.

Q. Do you remember the giving of such parties after Mrs. Danford—after the year 1887?
A. No.
Q. Were not parties given in 1895 of that kind?
A. By my father-in-law?
Q. Yes, parties to natives and foreigners?
A. No.
Q. Are you sure of that?
A. I am sure.
Q. How frequently did natives enter the house and take meals with Mr. Notley after your return in 1895?
A. I don't think there was any native went to the table at that time.

(End of Page 86 Official Transcript.)

Q. Do you recollect any instance from 1885 to 1895 where native guests were entertained at your father's table when Mrs. Danford was there?
Q. How many Hawaiian relatives of your mother continued their visits at the home in 1895 when Mrs. Danford was at the home?
A. I don't remember Sam Parker ever coming there again.
Q. How about the other members of the Parker family? Do you remember their being there after 1895?
(No answer.)
215 Q. Do you remember any members of the Parker family visiting your mother at the home in Paauilo when Mrs. Danford was there after 1895?
A. I remember Miss Low.
Q. Any other visit by any other of her relatives?
A. Later on Mrs. Danford was in Honolulu when she was married. Miss Low went there and slept there.
Q. I am asking you while Mrs. Danford was at the house?
A. No.
Q. Have you any knowledge or recollection of any visits paid by Mr. Notley to any of his old Hawaiian friends after 1895?
A. I think he stopped all that visiting among all his Hawaiian friends.
Q. When Mrs. Danford was away and had married and gone away, were not Hawaiians coming to the house?
A. Yes, to see Mrs. Notley and old Mr. Notley.
Q. How did he receive them after her marriage?
A. Very cordially; in the same old way that he used to do.
Q. Do you remember—Can you recollect the names of any Hawaiians that visited him when she went away?
A. There was a parson—Mr. Kamakawiwoole, Mr. Waiohinu and wife, a neighbor of ours.
Q. Did they come when Mrs. Danford was there?
A. They used to go there to my cottage; not to the main house.
Q. Do you recollect any occasion where any relatives of the family did go or attempt to go to the house of Mrs. Notley?

(End of Page 87 Official Transcript.)

216 A. Yes.
Q. Who was that?
A. That was my brother-in-law and my sister, Mrs. Thomas Lindsay, and her children.
Q. Where did they come from?
A. Waimea.
Q. And stopped where?
A. In the cottage where I was living.
Q. Were they entertained at all at the main house?
A. No.
Q. Lindsay—what is his name?
A. Mr. Thomas Lindsay.
Q. Had he ever been entertained at the main house before?
A. Yes; frequently.
Q. In the old days?
A. Yes.
Q. Of your own knowledge?
A. My own knowledge.
Q. Sat at the table?
A. Sat at the table with the family.
Q. How was he received those days by your father-in-law?
A. As a stranger. In the former days?
Q. Yes.
A. Took him in as a son to us.
Q. This time that Mr. Lindsay came there and stopped at your cottage, how did your father receive him?
A. Not the same as in former days.
Q. In what way? How could you know that?
217 A. He acted as if Mr. Thomas Lindsay was a stranger to him.
Q. In what way did that manifest itself?
A. There is not that warm feeling in him to see an old friend's son that comes to his place; he didn't have that loving way——

Mr. DAVIS (Int.): I want to ask to have this answer stricken out, on the ground that it is conclusion and not a fact.
The COURT: The motion to strike out the answer will be denied.
Mr. DAVIS: I except to your Honor's ruling.
The COURT: Exception allowed.

Mr. KINNEY:

Q. When you came back in 1895 where did your mother spend her time on the place?
A. Washing and ironing.
Q. Where?
A. In the ironing house.
Q. That ironing house—is that the same cottage that you moved to in 1887?
A. No.

(End of Page 88 Official Transcript.)

Q. Was that ironing house—which is the cottage that is spoken of as being north of the main house?
A. It is a one-roomed house; a small one.
Q. The will speaks of giving your mother a cottage north of the main house?
A. It is north of the tennis court.
Q. South of the ironing house; the house nearest north from the main house?
218 A. No, it is east of the tennis court.
Q. How many houses are there on the place.
A. Three.
Q. Which is nearest north—there are three cottages besides the main house?
A. Yes.
Q. Now, identify them; describe them.

The COURT:

Q. Is that ironing house north?
A. No, it is east.

Mr. KINNEY: But is the one evidently intended?

Mr. DAVIS: I object.
The COURT: The jury are to disregard that statement of counsel; that that was evidently the one intended. Counsel is not giving evidence at the present time.

Mr. KINNEY: Please identify the three cottages.
A. One is on the southwest.
Mr. KINNEY: If you have no objection that will be called the Lightfoot cottage.
Mr. BROWN: No.

Mr. KINNEY:

Q. Where is the second cottage?
A. East of the tennis court.
Q. Where is the third?
A. North of the tennis court; the smaller one.
Q. How many rooms in that?
A. Only one room.
Q. Now, which of these cottages did your mother use to stay in when you went there in 1895?
219 A. The one that I live in at the present time.

(End of Page 89 Official Transcript.)

Q. Which one is that?
A. It is east of the tennis court.
Q. Have you any furniture or effects on the place yet—Have you any of your effects on the premises now?
A. Yes.
Q. Where are they?
A. In those two cottages.

Q. In what two cottages?
A. The southwest and east of the tennis court.
Q. That is the Lightfoot cottage, and the cottage east of the tennis court, where your mother was in the habit of stopping?
A. Yes.
Q. That cottage east of the tennis court, when was that cottage built?
A. I think in the nineties.
Q. About what time in the nineties?
A. I don't remember; I was living in Honolulu at that time.
Q. I will ask you whether or not in 1889, when you left there, that cottage was built?
A. East of the tennis court?
Q. Yes; we will call it your mother's cottage?
A. Yes.
Q. Was it built when you left in 1889?
A. No.
Q. In 1889 what had become of the cottage where William had been secluded when you left.
A. That was demolished after we left.
Q. When you left in 1889, where was that cottage?
220 A. William's?
Q. Yes.
A. The house is still standing there.
Q. Is William's cottage one of these three?
A. Yes; part of the lumber came from William's cottage.
Q. What I mean is, originally was William's cottage any part of these three?
A. No; the one on the east of the tennis court is part of this cottage.
Q. Where did his cottage stand?
A. On the southeast of the new cottage that they built.
Q. That is by a new cottage you mean the mother's cottage?
A. The mother's ironing cottage.
Q. In a different locality where these three are now?
A. Yes.

(End of Page 90 Official Transcript.)

Q. When you returned in 1895 where was William's cottage?
A. It was already demolished.
Q. When you left in 1889, your mother's cottage was not built at that time?
A. No.
Q. Do you know Mr. Lydgate?
A. Yes.
Q. Do you know what year he came there to Paauilo?
A. I think in the fall of 1885 or 1886.
Q. Was your mother living in any cottage outside when he came there in 1886?
220¼ A. No.

Q. Was your mother living in any cottage outside the main house up to the time you left in 1889?
A. No.
Q. Now, referring back—were not—when you returned in 1895 what was done upon the place in the evenings by members of the family?
A. In the main house?
Q. Yes, or anywhere?
A. We didn't go back to the main house.
Q. Didn't you go there evenings from 1895 to 1899?
A. Yes.
Q. Didn't go in?
A. No.
Q. Was your mother in the main house in the evenings?
A. Yes, she was there with Mr. Notley, her husband.
Q. When?
A. At all the time that I have been there from 1895 to 1899.
Q. Where did you say your mother would be?
A. In the main building, with her husband Mr. Notley.
Q. Where did she spend the day?
A. In the cottage, doing her ironing and washing.
Q. Where did she eat from 1895 to 1899?
A. Sometimes down to the main building; sometimes with us.
Q. What part of the main building?
A. In her own dining room.
Q. What time would she go down to the house at the end of the day?
220½ A. Well, she will go from there in the morning and back again to her coffee and out again to do her washing.

(End of Page 91 Official Transcript.)

A. She is occasionally back and forth from the main building to her cottage, where she irons.
Q. In the evening, what then?
A. She goes back to the main building.

The COURT:

Q. At what time?
A. About 9 o'clock.

Mr. KINNEY:

Q. Where did she usually spend her evenings until nine o'clock?
A. With us in the cottage.
Q. Which cottage?
A. The cottage east of the tennis court.
Q. Returning now to the first trouble in 1886, when you moved out of the home for the first time, how did that trouble come about?
A. Because I objected to my father-in-law's wish for not sewing a dress for Miss Mullinger. I told him I had the children to attend to.

Q. What was your motive for refusing?
A. Because I didn't like her.
Q. You give the answer here that you were busy?
A. Busy; and also that I didn't like her.
Q. When you said that what happened?
A. He ordered us out of the place.
Q. How soon did you go?
A. That very night.

The COURT:

Q. Who do you mean by us?
221 A. Myself and my husband out of the place.

Mr. KINNEY:

Q. And you went?
A. Across the gulch to Mr. Lindsay's cottage.
Q. Why didn't you like her?

Mr. DAVIS: I object, if your Honor please?
The COURT: Objection sustained.

(End of Page 92 Official Transcript.)

Mr. KINNEY:

Q. What had happened prior—How did she come to the question of sewing? How was it you were asked to do her sewing?
A. I suppose she wanted us——

Mr. DAVIS (Int.): I object to what she supposed.
The COURT: The objection is sustained.

Mr. KINNEY:

Q. What were her relations with the family—at the time with Mrs. Notley; friendly or not?
A. Unfriendly.

Mr. DAVIS: I object to that and move it be stricken out. It is a conclusion; not a statement of facts.
The COURT: She testified to the attitude; whether or not there was reason for the attitude of Mrs. Danford is a matter that may be brought out on cross-examination. The motion to strike out is denied.
Mr. DAVIS: We except to your Honor's ruling.
The COURT: Exception allowed.

Mr. KINNEY: What were your relations with her during that first six months of her stay there?
A. Not on very good terms.
222 Q. What were your relations during that six months with mother Notley?
A. Always friendly.
Q. You say that the relations were strained between Mrs. Danford and Mrs. Notley?
A. They were unfriendly.

Q. That night that you moved or that day that you moved, what, if anything, did Mrs. Notley do?

A. She was in deep grief to have her son, Mr. Notley, moved out of the house.

Q. How did she show it?

A. She wailed.

Q. What did she say?

A. She said it is the first time——

Mr. STANLEY (Int.): I object to what Mrs. Notley said in her wailing.

Mr. KINNEY:

Q. Where was Mr. Notley, the old gentleman, at the time?

A. In the parlor.

Q. Was he within hearing?

A. Yes; he was within hearing. She was sitting under his feet.

Q. Please tell us what she said when she wailed.

A. She wailed, it is for the first time she'd have any of her children turned out of the house.

Mr. STANLEY: I object and move it be stricken out

(End of Page 93 Official Transcript.)

until it is shown Mrs. Danford understood the wailing.

The COURT: The question does not call for an answer
223 which would look to the impeachment of any witness and for that reason the motion is denied to strike out.

Mr. STANLEY: I note an exception, your Honor.

The COURT: Exception allowed.

Mr. KINNEY: Tell us what she said in her wailing to her husband. Put it in Hawaiian.

(No answer.)

Q. Did Mr. Notley understand Hawaiian?

A. Certainly.

Q. Give it to us in Hawaiian.

A. She said "Auwe kuu keike——

Hawaiian interpreter sent for.

Mr. KINNEY: I ask that it go on the record in the native tongue.

(Mr. Charles Hitchcock acts as Hawaiian interpreter at this point, being sworn for that purpose.)

Mr. KINNEY:

Q. What is the first you said?

A. "Auwe kuu keike kau mea aloha na keike."

INT: "Alas my children, the ones that I love, my children, you are all being expelled from your home."

(Witness continues to speak in Hawaiian.)

Mr. KINNEY:

Q. Anything more you can remember?

A. (Through interpreter.) Where we have lived patiently.

Mr. BROWN: I object to what the witness is stating now in Hawaiian, as not being what she said before.

The interpreter takes down the witness'*es* statement in Hawaiian to be copied by the stenographer in his notes.

Recess here taken until 1:30 p. m.

(End of Page 94 Official Transcript.)

224 SATURDAY, *January* 23, 1903—1:30 P. M.

Calling of the Jurors waived. Jury and parties all present.

Mr. KINNEY: May it please the Court we contend that what was said by Mrs. Notley to her husband in the manner indicated by the witness——

Mr. DAVIS: When Mr. Kinney?

Mr. KINNEY: We are only talking of one occasion. You can ask the record and find out. What was said by Mrs. Notley on the occasion testified to by the witness is relevant as part of the *res gestæ*, and as tending to show the nature and the degree of force of the appeal made to her husband, and to enable the jury to judge of the mental condition and the attitude of his mind towards his wife and son Charles at that time.

Mr. DAVIS: It is submitted that the only ground upon which statements are admissible even by a testator as a part of the *res gestæ*— (citing authorities.)

The COURT: The motion is granted; the answer of the witness may be stricken out and the jury instructed to absolutely disregard any statements made by the witness as to the declaration made by her mother upon the occasion testified to.

Mr. KINNEY: We note an exception.

The COURT: Exception allowed.

Mr. KINNEY: I would like to state that I offered the evidence for the purposes—I wish it to appear now that the evidence
225 was offered for the purposes and is offered for the purposes I have stated in opening the argument.

The COURT: It is so understood. I think the reporter also has the statement made by you.

(End of Page 95 Official Transcript.)

Mrs. EMMA NOTLEY, previously sworn for the Contestants, testifies as follows:

Mr. KINNEY:

Q. When Mrs. Notley was at her husband's feet what did she do?

Mr. STANLEY: I do not remember there was any evidence of Mrs. Notley being at her husband's feet.

The COURT: There was.

A. She was asking her husband to let her remain in the house, not to have us out.

Q. How did he decide it?
A. I left the room while she was asking that.
Q. You didn't hear what was said by him?
A. Of course I went in our bedroom to pack our things.
Q. Did he give you any message or say anything before you left—the old gentleman?
A. No.
Q. Who was it asked you to sew this dress?
A. Emma Mullinger.
Q. Where were you when she asked you?
A. In my bedroom in the main building.
Q. When you declined and said you were busy what answer did she make?
A. Never gave me any answer.
Q. What did she do?
226 A. Nothing; she walked right out with the piece of material she had in her hand.
Q. How soon after that did the old gentleman come to you?
A. After dinner in the evening; we had this conversation in the morning.
Q. Who was present at the time you had this conversation?
A. No one.

(End of Page 96 Official Transcript.)

Q. Had you told Mr. Notley, the old gentleman, about it?
A. No.
Q. How did he know?
A. I don't know.
Q. When he came to you what did he say?
A. He asked me the reason why I didn't do Emma's dress up; she gave her dress to me. I told him I could not do it because I had children.
Q. What did he say then?
A. Never said anything to me, he walked right out of the room.
Q. What time did he ask you?
A. It must have been 4 o'clock in the afternoon.
Q. Emma asked you about it in the morning, what time?
A. After breakfast.
Q. Then Mrs.—then the old gentleman came to you at 4 o'clock in the afternoon. What day did you get the order to leave?
A. It was after nine in the evening.
Q. How soon were you out?
227 A. In about half an hour.
Q. That very night?
A. Yes, that very night.
Q. Before you left that time, and during the first six months or so of Miss Mullinger's stay at the house, what were her relations with her uncle?
A. They were always together.
Q. How do you know that?
A. I have seen them go by?

Q. Going where?
A. Out riding and to the canefield.
Q. What time of the day?
A. Sometimes they would start off after breakfast, then after lunch in the afternoon.

(End of Page 97 Official Transcript.)

Q. How about what was being done while they were in the house?
A. I never went back to the house, I was always out.
Q. You say you saw this after they left the house, saw them ride out together?
A. Yes.
Q. I mean before they left the house?
A. They were always together.
Q. What doing?
A. Talking to one another.
Q. Who was in the conversation?
A. Only the two.
Q. How frequently did you observe that during that first six months?
A. In the main house I think.
228 Q. Yes, how often did you see them talking by themselves?
A. When I came in the parlor I saw them in the parlor talking.
Q. Didn't the old gentleman associate with you when she came?
A. Very little.
Q. Not as frequently as before?
A. No.
Q. Did he associate — or notice the children?
A. Yes.
Q. As much as before?
A. No.
Q. What was Miss Mullinger's treatment of the children at the first six months then?
A. I don't think she cared much for children at the time.
Q. Well as a matter of fact did she or did she not notice the children much?
A. Very little.
Q. Did you notice anything to indicate the degree of affection existing between the uncle and Miss Mullinger that first six months?
A. Yes, I noticed that.
Q. What did you say?
A. They had been closely together at all times.
Q. Anything else that you can think of to show the degree of affection for each other?
A. She is the first that he would offer his assistance to.

(End of Page 98 Official Transcript.)

229 Q. Assistance that a gentleman offers to a lady?
A. Yes.

Q. How was it when his wife was present?
A. Well, he would offer her the first assistance.
Q. Who do you mean by "her"?
A. This Mrs. Danford.
Q. What other evidences of affection did you see between the two that first six months?
A. That is all I can recollect, being closely together.
Q. How close together?
A. Sitting around and going out riding.
Q. What was done in the evenings during that first six months Miss Mullinger was there?
A. He would occupy most of his time with Miss Mullinger.
Q. Where?
A. In the parlor.
Q. How was it occupied?
A. Miss Mullinger would sit and talk and converse with him in the parlor.
Q. Sitting in the parlor?
A. On a chair, of course.
Q. How long would these talks be?
A. I didn't remain in the parlor long because I had to go to my children.
Q. Who else would be in the parlor generally?
A. Mr. Notley the huband of Mrs. Notley, mother Notley.
Q. What part would she take in the talk?
A. Very little, she would say to Mr. Notley.
Q. What would Mr. Notley and Miss Mullinger be talking about?
230 A. That I don't know.
Q. How did he greet her in the morning?
A. You mean Miss Mullinger?
Q. Yes? How did the old gentleman greet Miss Mullinger in the morning?

(End of Page 99 Official Transcript.)

A. She would come up and kiss him.
Q. Did she kiss him often?
A. Very.
Q. How, in what way?
A. "Good morning, dear uncle," that is her greeting the first thing in the morning and the last thing when he retired.
Q. "Good morning dear aunt," too?
A. No.
Q. How often would she kiss him during the evening?
A. That is before she retired to bed.
Q. Well, during these six months did you have any social pleasures as before her arrival—singing?
A. No.
Q. Nothing of that kind?
A. No.
Q. Do you mean it stopped altogether?

A. Yes, it stopped altogether.
Q. Immediately on her arrival?
A. That is to my knowledge.
Q. You have no recollection of any gathering there of different members of his own family when they sang or performed in any way?
A. No.
231 Q. Did Miss Mullinger object to any attentions that your father would show to the children?
A. I suppose constantly with her uncle.
Q. The question is, how would Miss Mullinger take any attentions shown by the old man to your children?
A. His attention towards my children?
Q. Yes, how she took them?
A. I don't know whether she would like it or not.
Q. Was there anything said or done to indicate whether she liked it or not?
A. Not in my presence.
Q. During that first six months?
A. Yes.
Q. Did Miss Mullinger remain at the home at Paauilo upon her arrival there, or did she go to school?
A. She was sent to school.

(End of Page 100 Official Transcript.)

Q. To what school?
A. Miss Wallace's.
Q. Where?
A. Honolulu.
Q. How long did she remain there?
A. In the summer when she came up again.
Q. The summer of what year?
A. 1886.
Q. What time in 1886 did she come down?
A. I can't remember.
Q. Where did she go in the fall? or if at all in the fall of 1886?
A. She was home.
Q. What school did she go to next after the Wallace's?
232 A. To the Roman Catholic sisters.
Q. After that where did she go to school?
A. She was brought home.
Q. And taught at home?
A. Yes.
Q. By whom?
A. Mr. Lightfoot and Mrs. Lightfoot.
Q. Do you remember any trouble at the home after the Lightfoot's came?
A. Yes.
Q. Do you remember when that took place?
A. 1888.
Q. What time in 1888?
A. January.

Q. What was the trouble?
A. About some crockery ware——
Q. What about crockery?

Mr. DAVIS: I object, I submit the only evidence of this is that they are the surrounding circumstances, to constitute a part of the *res gestæ* and that is all that can be admissible.
(Argument between court and counsel.)
Mr. Davis withdraws objection for the time being.

Mr. KINNEY:

Q. What about the crockery. You say it is trouble about crockery?
A. It had been taken by the Lightfoot's.
Q. From where?
A. From the main house.

(End of Page 101 Official Transcript.)

Q. When the trouble occurred, who did it occur between?
233 A. Mrs. Notley and the Lightfoots.
Q. I mean the trouble.
A. Mrs. Notley went up there and took the crockery away from the Lightfoots.

Mr. BROWN: I move that the answer may be stricken out as it is not part of the *res gestæ*.
The COURT: The objection will be overruled subject to the answer being stricken out in the event of counsel failing to connect.

Mr. KINNEY:

Q. What then happened?
A. Then Miss Mullinger objected to her taking these things from the Lightfoot cottage.
Q. What did Mr. Notley do if anything?
A. He told his wife not to take these things from the Lightfoots.
Q. What did he do?
A. He came out and struck her and she fell flat in front of the kitchen door.
Q. Who was present when he struck her?
A. I was present and Mr. Notley, Jr., and Miss Mullinger and Mr. Lightfoot were under a pear tree. Mr. Lightfoot was saddling his horse to go off.
Q. What date was this?
A. In 1888.
Q. What month?
A. In January.
Q. What was said by any one at the time he struck her?
A. Miss Mullinger sang out to her uncle "Drive that black woman out of the yard, do uncle do?"
234 Q. After he struck his wife what happened to her, you said she fell down?
A. Yes.

Q. What did he do next?
A. He tried to strike her again but Mr. Notley Jr. crossed his hands and held him back.

(End of Page 102 Official Transcript.)

Q. What happened then?
A. The son, Mr. Notley, Jr., took hold of the father and took him around the house and as they were turning around the corner of the main building then he commenced to collapse.
Q. Who?
A. Mr. Notley, senior, he cried and said "Why did I do this?" I did not hear anything further because they were out of my hearing.
Q. And Charles was leading him away?
A. Yes.
Q. What was the condition of your mother when she got up?
A. She was in a stupor.
Q. Where did he strike her?
A. The back of the neck here (showing).
Q. What effect did it have on her?
A. She collapsed right away and fainted.
Q. Did it leave any marks or anything of the kind?
A. I did not go and see it.
Q. You say that in 1888 that Mr. Notley, Sr., ordered Charlie and yourself away again?
A. Yes.
235 Q. When was that in reference to this occurrence that you have testified to, was it before or after that when he ordered you away in 1888?
A. After he had struck her?
Q. About how long after?
A. When he struck her?
Q. How long after he struck her did this other trouble happen which led Charles to be sent away?
A. Two weeks.
Q. Who was that trouble between?
A. Between the Lightfoots.
Q. I mean the members of the family?
A. Between the father and the son, Charles Notley, Sr. and Charles Notley, Jr.
Q. About what person?
A. About Mr. Lightfoot.
Q. Well, was Miss Mullinger concerned in it?

(End of Page 103 Official Transcript.)

A. I don't know about that.
Q. I mean not what she did or didn't; was the dispute about her as well as the others?
A. Yes.
Q. In that dispute who did the old gentleman believe, his son or Mrs. Danford?
A. He believed his son first, Mr. Notley, Jr.

Q. Did he change his mind?
A. Later on in the evening of the same day.
Q. And when he changed his mind what happened then?
A. We were sent out of the place.
236 Q. As I recollect, you say that you stayed away four days?
A. Yes.
Q. How did you go back?
A. We came back as soon as the Lightfoots left the cottage.
Q. Who asked you back?
A. My father-in-law, Mr. Notley, Sr.
Q. When he asked you back did he believe Charles then or not?
A. Yes.
Q. And you say that you and your husband occupied the Lightfoot cottage?
A. Yes.
Q. After that, how were the relations between Mr. Notley, Sr., and Miss Mullinger, were they as friendly as ever, or not?
A. No, he was a very angry man.
Q. I mean when you came back and stopped at the Lightfoot cottage for those following weeks was the old gentleman as friendly to Mrs. Danford as he was before, or not?
A. I don't think so.
Q. How long did they remain there after that trouble?
A. I believe they left shortly after the trouble.
Q. To go where?
A. To take her back to England.

(End of Page 104 Official Transcript.)

Mr. STANLEY: I will ask if the witness is speaking of her own knowledge as to the intention of these parties leaving.

237 Mr. KENNEY:

Q. How did you come to believe they were going to England?
A. They spoke of that in our presence.
Q. Who did?
A. Mr. Notley, Sr.
Q. Did they go to England?
A. No, they went as far as Honolulu.

The COURT:

Q. Who went as far as Honolulu?
A. Mr. Notley, Sr., Miss Mullinger and Mrs. Notley, the mother-in-law.

Mr. KINNEY:

Q. What was done with Miss Mullinger in Honolulu? You say she didn't go to England?
A. She was put in Mrs. Mist's home.
Q. And the old gentleman returned to Hamakau?
A. Yes, returned with Mrs. Notley.
Q. That was in 1888?
A. Yes.

Q. When did you—you say you went to Honolulu in 1889.
A. Yes.
Q. When was it you again saw the old gentleman Notley and Mrs. Danford together?
A. In Honolulu.
Q. What time was that?
A. I can't remember.
Q. Was it after you went in 1889?
A. Yes.
Q. What were their relations towards each other then? Were they still huhu at each other?
A. No they were in the carriage together.
Q. When you went to Honolulu where did you stop?
238 A. At Kakaako.
Q. Where then did you go?
A. To my mother's home in Honolulu.
Q. While at Kakaako did Mr. Notley, Sr., have a home in Kakaako.
A. Yes.

(End of Page 105 Official Transcript.)

Q. And it was there you stopped?
A. Yes, for a short while.
Q. While you were at Kakaako was the old gentleman down to Honolulu at any time?
A. Yes.
Q. While you were at Kakaako?
A. That is the reason we left the Kakaako home on account of their going to the house at Kakaako.
Q. Who was going to the house?
A. Mr. Notley, Sr., and wife at the term of the legislature. I left the house and went to my mother.
Q. And all that you saw of Emma Danford was to see her on the street?
A. Yes.
Q. And you remained with your husband in Honolulu until '93?
A. Yes.
Q. During that time did you see anything of Miss Mullinger?
A. No.
Q. Did you see much or anything of Mr. Notley, Sr.
A. No.
Q. You and your husband lived there in Honolulu?
A. Yes.
239 Q. Didn't he usually come to see you when he came down?
A. Once or twice.
Q. From 1890 to 1893?
A. Yes.
Q. How often?
A. Once or twice.
Q. During these three years?
A. Yes.

Q. And in 1893 where did you and your husband go?
A. To Hilo.
Q. And remained there until when?
A. 1895.
Q. When you went back to Hamakau, as you have testified?
A. Yes.
Q. That last time when your father turned Charles out and ordered him away, who was present when he gave that order?
A. Miss Mullinger.
Q. When he ordered him out of the house what did Miss Mullinger do, how did she take it?

(End of Page 106 Official Transcript.)

A. She was sitting in there reading a book.
Q. When the order came to leave what did she do?
A. She was full of smiles.
Q. Prior to Mr. Notley, Sr., going to England in 1885, when he brought Mrs. Danford back, did you ever hear him say anything about a will or anything of the kind?
A. Before his going away?
Q. Yes?
240 A. On the evening before he went away he left the key of the safe in Mr. Notley, Jr.'s charge and told him——

Mr. STANLEY: I object, it is incompetent, immaterial and irrelevant to the issue, any declaration that testator gave in 1885 about the will, as not being material or relevent to the will in question.
The COURT: The objection is overruled.
Mr. STANLEY: Your Honor will allow an exception.
The COURT: Exception allowed.

Mr. KINNEY:

Q. What if anything did he say further at the time of his turning over of the keys of the safe?
A. He said "if anything should happen to me on my way I have already made a will; everything is favorable to you children and your mother."
Q. Who was present when he said this?
A. Mr. Notley, Jr., and myself, and Mrs. Notley, the widow.
Q. Do you remember the occasion of Mrs. Danford's wedding?
A. Yes.
Q. What time did that take place?
A. In 1898.
Q. What time in 1898?
A. October.
Q. Where were you at the time?
A. I was there.
Q. At Paauilo?
A. Yes, the wedding took place in Paauilo.

(End of Page 107 Official Transcript.)

241 Q. Were you there when preparations were being made for the wedding?
A. Yes.
Q. Was there a family album belonging to the Notleys, belonging to your mother at the house?
A. Yes, an old one.
Q. Containing pictures of whom?
A. Of the family and some friends, Sam Parker and family.
Q. The family and her immediate people?
A. Yes.
Q. Who?
A. Mr. Parker, her cousins, nephews, I mean uncles.
Q. Any pictures of her when young, with the children?
A. Yes, with the children and father and mother.
Q. What became of that album?
A. I am sure I don't know.
Q. What became of the pictures?
A. I have some few of them.
Q. Where did you get them?
A. I found the Jap burning them.
Q. Where?
A. In Paauilo, in the rubbish pile.
The COURT: Found who burning them?
A. A Japanese woman.

Mr. KINNEY:

Q. Where was Mrs. Danford at the time?
A. She was there.
Q. In sight of the main house?

242 Mr. STANLEY: I object it is leading (objection not insisted upon.)

Mr. KINNEY:

Q. Where was this rubbish pile in reference to the main building?
A. Right mauka of the washing house.
Q. Do you know whether or not Mrs. Danford was in the main building?
A. That is where she always keeps herself.
Q. Where was this album when you last saw it, before the pictures were found burning?
A. In the main building.
Q. At that time who was in charge of the main building; who was mistress of the house?
A. Miss Mullinger then.

(End of Page 108 Official Transcript.)

Q. What part of the main building was this—when was this in reference to the marriage?
A. Before.
Q. How long before?
A. A week.

Q. What was being done at the main house, if anything a week before the marriage?
A. There was a general cleaning up and burning up of old things.
Q. Who was doing it?
A. Miss Mullinger.
Q. How long had Miss Mullinger been mistress of the house?
A. Since we left the home.
Q. In 1889?
243 A. Yes.
Q. Had she been installed as mistress before you left?
A. No. I think after she came back——
(Int.)
Q. When you went there in 1895 from Hilo who was the mistress of the house, who directed the servants, etc?
A. Miss Mullinger.
Q. What did you do when you saw these photographs burning?
A. I asked the Jap——
(Int.)
Q. What if anything did you do?
A. I picked some of those pictures up.
Q. Out of the pile?
A. Yes.
Q. Where was the old lady at the time?
A. In the ironing house in the cottage.
Q. Did she remain there?
A. Yes.
Q. What if anything did you do with the pictures?
A. I have some.
Q. Still?
A. Yes.
Q. Do you know whether or not the old lady at the time knew these pictures were being burned?
A. Yes, I went up to her and spoke to her about them?

(End of Page 109 Official Transcript.)

Q. You spoke to her when?
A. About the pictures to my mother-in-law, and said——
Q. I mean before or after you saw the burning?
A. After.
244 Q. How long after?
A. The very same hour I picked these pictures up.
Q. You mean within an hour?
A. I came right from the place where they were burning up to my mother-in-law with the pictures in my hand.
Q. What if anything did she do?
A. Mrs. Notley?
Q. Yes, when she saw this?
A. She didn't like it.
Q. How do you know she did not like it? She showed she didn't like it?
A. Yes.

Q. Was there anything to indicate she knew anything of that? (Int.)

Mr. DAVIS: Is this part of the *res gestæ*, the burning of photographs?

(Mr. Kinney argues to the Court.)

Mr. STANLEY: I ask the Court to instruct the Jury to disregard what Mr. Kinney says.

The COURT: Unless you prove these photographs testified to by the witness were destroyed under Miss Mullinger's instructions, directions and orders, I do not see how they are relevant in any way.

Gentlemen of the Jury you are not supposed to hear as a matter of evidence questions of law between Counsel and the Court and any statement made by Counsel not under oath is to be absolutely disregarded by you. It is not to be construed by you as proof of any fact at issue in this matter.

(End of Page 110 Official Transcript.)

245 Mr. KINNEY:

Q. Where did you say that album had been when you last saw it?

A. In the main building in the parlor.

Q. Did Mr.—did you go into the parlor again when that at any time—where in the parlor did the album lie?

A. On the center table of the room.

Q. How many albums were there there?

A. Only one to my knowledge.

Q. This one?

A. Yes, this one in the parlor.

Q. What time of the day was it these pictures were burned?

A. In the afternoon.

Q. Who was this Jap woman?

A. Miss Mullinger's servant.

Q. How long had she been Miss Mullinger's servant?

A. She was there before I returned to the place in 1895.

Q. When you came there the servant was there?

A. Yes.

Q. So she had been there from 1895 to 1898, this Japanese woman?

A. Yes.

Q. Now you cannot say what was said to the Japanese woman, but what did you do when you went up there to this pile?

A. I asked her that——

(Int.)

Q. What did you do, did you say this is good or not?

A. No, I told her "What makes you burn pictures like this?"

246 Q. What became of the Japanese woman?

A. I don't know if she is there or not?

Q. I mean at the time you spoke to her?

A. She still went on with her burning of the rubbish.

Q. Didn't pay any attention to your protest?

A. I think she did.

Mr. DAVIS: I object to that.
The COURT: Objection sustained; the answer may be stricken out.

(End of Page 111 Official Transcript.)

Mr. KINNEY:

Q. Where did she go after that?
A. I left her there.
Q. And you went off?
A. Yes.
Q. Did you ever see anything more of that album—did you ever hear from Mrs. Danford about those pictures?
A. No.
Q. Or did she come and look for them or make any excuses?

Mr. STANLEY: I object to that question as being leading.
The COURT: The objection is sustained.

Mr. KINNEY: Was anything ever said to you by Miss Mullinger about these pictures?
A. No.
Q. When did you next go into the parlor after that burning?
247 A. I never went into the parlor until after she was married.
Q. How long after?
A. About a month after.
Q. How long did she continue as mistress of the house after this burning?
A. She went right away.
Q. After the marriage?
A. Yes.
Q. Did you go to Miss Mullinger's wedding?
A. No.
Q. Didn't at all?
A. No.
Q. What members of the family attended her wedding?
A. Mr. Notley, Jr. and Mr. Notley, Sr., and Mrs. Notley and my four children.
Q. Did you have any conversation with Miss Mullinger in reference to the education of your children about that time?
A. That was the day before she got married.
Q. Tell us what was said about the education of the children?

(Objection by Mr. Davis. Afterwards withdrawn.)

Mr. KINNEY:

Q. What did she say about the education of your children, what did Miss Mullinger say?
A. It was Mrs. Greenfield and Miss——

(End of Page 112 Official Transcript.)

Q. What did Miss Mullinger say about the education of your children?

A. She said that I ought to be thankful she got my chil-
248 dren to be educated, and that she had been taking good care of my children.

Q. That was, got your children to be educated? Did she say by whom?

A. She said by my uncle.

Q. What did she answer?

A. I said no—one who is educating my children. We had our children first in the public school.

Q. Did the old gentleman contribute heavily to their education?

A. Yes.

Q. But she claimed she had got the education of your children?

A. Yes, she had got the education.

Q. Where were your children at the time of the marriage of Mrs. Danford?

A. In Paauilo.

Q. That was in October?

A. Yes.

Q. Why didn't they go back to the schools?

A. Because my father-in-law asked me to keep the girls back as Miss Mullinger was going to be married, that they could stay in the house with him and be in the place of Miss Mullinger there.

Q. Take Miss Mullinger's place?

A. Yes.

Q. And did you keep them back from school?

A. Yes.

Q. Did they take charge when Miss Mullinger left?

A. Yes, they took charge.

249 Q. What if anything did the grandmother have to say about that arrangement?

A. She was very pleased with it.

Q. Who had control? either yes or no, and what should be done?

A. The grandmother Mrs. Notley.

(End of Page 113 Official Transcript.)

Q. After Mrs. Danford left?

A. Yes.

Q. Did the girls take charge?

A. Yes.

Q. How long did that continue that way?

A. Continued to the death of their grandfather.

Q. How long did Mrs. Danford remain away after her marriage?

A. Two or three months.

Q. Then where did she go?

A. To Paauilo.

Q. With her husband or alone?

A. Alone.

Q. During these few months when the household had been in charge of the old lady's granddaughters had there been any com-

plaints on the part of Mr. Notley, Sr., about the management of his house or anything of the kind?

A. No.

Q. What were his relations with those grandchildren during those two or three months?

A. Very friendly.

Q. Where were these children educated?

A. Keala and her sister Lily in the Priory.

Q. Where were they before they had been to the Priory?

250 A. In the High School.

Q. Were they at any other place besides the High School and the Priory?

A. They were living at Mrs. Mist's then.

Q. The same place where Mrs. Danford was placed?

A. Yes.

Q. Miss Mist is an English lady in Honolulu of high standing and culture?

A. Yes.

Q. Were the girls trained to receive and entertain?

A. Yes, they were trained to receive and entertain.

Q. Would play the piano, etc.?

A. Not by Mrs. Mist.

Q. Who taught them?

A. Miss Patch.

Q. They knew how to play?

A. Yes.

Q. Young ladies' accomplishments?

A. Yes.

Q. When Mrs. Danford got back after her marriage what happened?

A. There was another row.

(End of Page 114 Official Transcript.)

Q. About what?

A. She wanted Miss Barnard to come and stay in the house.

Q. Is she the Miss Barnard named in the will as receiving one thousand dollars?

A. Yes.

Q. How was that proposition done?

Mr. DAVIS: Did she know that of her own personal knowledge?

251 Mr. KINNEY:

Q. How do you know Miss Mullinger wanted Miss Barnard to be in charge of the house?

The COURT: Mrs. Danford.

A. Her mother-in-law came and spoke to me.

Mr. DAVIS: We move that the last answer be stricken out as hearsay.

The COURT: It is so ordered.

Mr. KINNEY:

Q. Did you have any conversation with Mrs. Danford?
A. Not after her marriage.
Q. And you were not present at the time when Mrs. Danford discussed the advisability of having Miss Barnard at the house?
A. No.
Q. Where was Miss Barnard when Mrs. Danford arrived in Hamakua?
A. She was at Mr. Renton's house, a mile from Mr. Notley's residence.
Q. Where did Mrs. Danford stay when she came to Paauilo?
A. In the main building.
Q. Spent all her nights there?
A. Sometimes she is out.
Q. For the night?
A. Once I remember she went down to Renton's and slept there with Miss Barnard.
Q. Was this row before or after she went down to the Renton's?
A. After.
Q. What was after?
A. The row they had over Miss Barnard.

(End of Page 115 Official Transcript.)

252 Q. Which was first, going down to the Renton's or the row?
A. Going down to the Renton's was first.
Q. Were you present at that trouble?
A. No.
Q. Where did that occur?
A. In the main building.
Q. And you were in the cottage?
A. Yes.

Mr. STANLEY: She not being present I move that the answer about the row about Miss Barnard be stricken out and that the jury be instructed to disregard it.

The COURT:

Q. Do you know of your personal knowledge about the row, except what was told you?
A. My mother-in-law told me.

The COURT: The motion is granted; the evidence of this witness with reference to any row at which she was not present may be stricken from the records, and the jury instructed to disregard it as no evidence in this case.

Mr. KINNEY:

Q. Were any of the effects of Miss Barnard at the house at that time?
A. Yes, they were sent out of the house. Miss Mullinger was present then and Mrs. Notley, Sr.

Q. How long did Mrs. Danford remain after Miss Barnard's trunk went out of the house, or effects went out of the house.
A. She was there three weeks after that.
Q. Were you present when Mrs. Danford left?
A. I think I was at Waimea.
253 Q. What happened when she left, you don't know anything about?
A. No.

(Recess here taken for five minutes, the Court duly admonishing the jury not to speak about the case.)
Jury all present.

(End of Page 116 Official Transcript.)

Mr. KINNEY:

Q. When was that lawn tennis court put in there. You were not there were you?
A. No.
Q. When you got there in 1895 it was there?
A. Yes.
Q. People came to play lawn tennis?
A. Yes.
Q. Where was the mother at the lawn tennis parties?
A. Doing her washing and ironing.
Q. Did you hear yourself, or receive any directions from Mrs. Danford or requests from the old lady when the lawn tennis parties were given?
A. No.
Q. From the year 1895 to 1899 how did Mrs. Notley and Mrs. Danford treat each other in the house?
A. Passed one another as strangers.
Q. You saw that yourself?
A. Very often.
Q. Pass?
A. Close by each other, yes and not a word to one another.
Q. What was the condition of things when you first got there in 1895? How was she and Mrs. Danford towards each other?
254 I think she has a dislike for Miss Mullinger. Mrs. Notley had a dislike for Miss Mullinger.
Q. Were they speaking to each other then?
A. I think very little.
Q. You say that they did speak to each other?
A. It was only when she wanted something done by Mrs. Notley.

Mr. STANLEY: I would like to ask if the witness heard the conversation.

The COURT:

Q. Did you hear the conversation?
A. Yes.

Mr. STANLEY:

Q. Between Miss Barnard, Mrs. Danford and your mother?
A. Yes.

Mr. KINNEY:

Q. You say that the old lady protested by wailing in 1886? Was that the only time she protested in that way?

(End of Page 117 Official Transcript.)

A. She did the same thing when we left in 1897. When we were ordered out of the place she wailed.
Q. What happened in 1897?
A. I mean in 1888.
Q. Where did she do her protesting at that time by wailing?
A. To Mr. Notley.
Q. Where was she when she did it?
A. In the main building.
Q. Where were you?
A. In the bedroom in the main building. Mr. Notley was in the parlor.
255 Q. From where he was could he hear her protest?
A. Yes, she was right there at his feet.
Q. Where was your room with reference to the parlor?
A. Next to the parlor.
Q. At any time after that did you again hear her protest?
A. Yes, that was in 1897.
Q. What was the occasion of that?
A. About the granddaughter Miss Hughes, Miss Maria Hughes.
Q. What about Miss Maria Hughes?
A. Miss Mullinger wanted her to be sent back to her parents in Kohala.

Mr. STANLEY: I would like to have counsel bring out whether the witness knows these things of her own knowledge.
The COURT: Mrs. Notley tell only what you know of your own knowledge.

A. I heard that in my presence.

Mr. KINNEY:

Q. By whom?
A. By Miss Mullinger.
Q. How long had this granddaughter been over there?
A. A month I think.
Q. When before that had she ever been at her grandfather's house?
A. Perhaps she may probably have gone there with her mother when we were away from the place; but when her father and mother left Hamakua to go to Kohala.

(End of Page 118 Official Transcript.)

Q. How large was she then?

256 A. She was seven years; five or seven, somewheres about that.

Q. A young child?

A. Yes.

Q. And when she returned, came to visit at her grandfather's how old was she then?

A. I think she was 14, no 15.

Q. How did this granddaughter get along with Miss Mullinger on the visit?

A. Not on very good terms.

Q. When your grandmother protested that time by wailing what was the result of it, did it stop her being sent back?

A. Yes, it stopped.

Q. What stopped?

A. They didn't send her home then right away, but was kept and we all took the steamer and went down to Honolulu.

Q. How many days after Miss Mullinger said she was to go?

A. Just a few days, three or four.

Q. Did Miss Hughes stop three or four days after that?

A. Yes.

Q. Did you have any personal knowledge as to how the parents were communicated with in Kohala?

A. Miss Mullinger had been communicating with the father of Miss Hughes.

Q. Do you know that of your own knowledge?

A. I was told.

The COURT: It may be stricken out.

257 Mr. KINNEY:

Q. Will you please give as near as you can the dates when Miss Barnard's trunk was taken out of the house, what month was it?

A. February, 1889.

Q. When you left in 1889 was there a garden on the place?

A. Yes.

Q. Who made that garden?

A. My mother-in-law and myself.

Q. When?

A. In 1877.

Q. What did it consist of?

A. Yes.

Q. What did it consist of, that garden?

Mr. STANLEY: I will say this evidence is immaterial and irrelevant to the issue.

(End of Page 119 Official Transcript.)

The COURT: What has the garden to do with it?

Mr. KINNEY: We wish to show that Miss Mullinger preferred a lawn to a rose garden, and took up the old lady's rose bushes and that she came around at the time it was being done and that at that time

the matter was brought home to Miss Mullinger that the old lady did not want it done and she, and she persisted in having it done against her wishes, and rooted up the entire garden.

The COURT: Did Charles Notley know of this and consent to it?

Mr. KINNEY: Yes, Charles Notley, Sr.

Mr. STANLEY: We object to this on the ground that it is
258 irrelevant and immaterial and is not admissible as evidence and is not part of the *res gestæ* in any way in connection with the will.

The COURT: Still I think it is testimony tending to show, or at least indicative of changed relations between the parties. I will allow it if counsel states he will connect it later.

Mr. STANLEY: Then I bow to your Honor's ruling and take an exception.

The COURT: The objection is overruled and the exception is allowed.

Mr. KINNEY:

Q. What did the garden consist of mainly?
A. Roses.
Q. Who planted those roses?
A. Myself and my mother-in-law.
Q. Where were they got from?
A. From Honolulu by mail, and Hilo. Got by myself and my mother-in-law. The garden was started in 1877.
Q. Who attended to it before you had sufficient servants?
A. Myself and my mother-in-law.
Q. Who watered it in dry weather?

Mr. DAVIS: The details of it are not evidence.
The COURT: The objection will be overruled.

Mr. KINNEY:

Q. Who watered that garden in dry weather?

(End of Page 120 Official Transcript.)

259 A. My mother-in-law.
Q. Got the water where?
A. In the gulch.
Q. Bringing it up how?
A. In pails.
Q. On her back?

Mr. DAVIS: I object. The method by which this water was carried is not part of the *res gestæ* and is not material.
The COURT: Objection sustained, the question is leading.

Mr. KINNEY:

Q. Who had in 1895 when you returned to Hamakua, who had the control, and direction of the servants around the place?
A. Miss Mullinger.

Q. Who had the control and direction of the use of horses, carriages, etc.?
A. Miss Mullinger.

Cross-examination.

Mr. DAVIS:

Q. Mrs. Notley Sr. has never ridden in a vehicle of any kind, Mrs. Notley, has she?
A. No.
Q. Doesn't now ride in carriages?
A. She does now sometimes.
Q. But didn't before Mr. Notley died?
A. No.
Q. You never saw her in a carriage at any time before the death of Mr. Notley?
A. What belongs to her?
260 Q. In any carriage?
A. Well, she gets on a hired carriage.
Q. But never rode in her own carriage before Miss Mullinger came?
A. Didn't have any.
Q. But even afterwards didn't ride when their relations were friendly?
A. No.
Q. Where did you first see this young lady?
A. In the fall of 1885.
Q. And you immediately took a dislike to her?
A. A little while afterwards, not very long.

(End of Page 121 Official Transcript.)

Q. Tell us?
A. In the summer of 1886.
Q. She had been there how long?
A. In the spring of '86.
Q. She had been there how long?
A. Not very long.
Q. How long?
A. I can't remember.
Q. Was it more than three months?
A. A little over that, I think.
Q. Your memory is not very good then as to time?
No answer.
Q. Can't you remember how long she was there before you took a dislike to her?
A. I remember she was there in the spring of 1886.
Q. How long was it after she came you took this dislike to her?
A. In the spring of 1886.
261 Q. When did she come?
A. 1885.
Q. Why do you say you can't remember how long it was before you took a dislike to her?

A. Six or seven months.

Q. Why did you tell me you didn't remember. You are sworn here. You are giving evidence. Why did you answer me that way? I will give you a chance to explain why did you answer me in that way.

The COURT: Answer the question if you can Mrs. Notley.

A. Because I didn't very well understand.

Mr. DAVIS: Well, you understood the question to say that you didn't remember how long after she came there that you took a dislike to her?

A. I understood you asking me that question.

Q. Then why did you answer me that you didn't remember?

A. I didn't remember at the time you asked me.

Q. What was the reason you commenced to dislike Miss Mullinger, what was the particular reason in the spring of 1886?

A. My dislike towards Miss Mullinger, my dislike towards her?

Q. Yes?

A. Because she was trying to take away the rights of my mother-in-law as the mistress of her home.

(End of Page 122 Official Transcript.)

Q. Repeat to the jury the first instance of any apparent desire on her part to assume the functions your mother-in-law exercised in the house?

262 A. She has always exercised.

(Int.)

Q. State that particular instance in 1886?

A. When Miss Mullinger was there?

Q. Yes.

A. She was always.

Q. Give me a particular—what particular act of hers in 1886 led you to believe she was interfereing with the rights of your mother-in-law?

A. She was always avoiding the presence of my mother-in-law towards Mr. Notley her husband.

Mr. DAVIS: I wish to have the answer stricken out as not response to the question. I object.

The COURT: That is not responsive, the answer may be stricken out.

Mr. KINNEY: We note an exception.

The COURT: Exception allowed.

Mr. DAVIS:

Q. Will you please tell me what particular thing she did or said in the spring of 1886 that you construed into interfering with the rights of Mrs. Notley, Sr.?

A. Do you mean Miss Mullinger?

Q. I mean Miss Mullinger; what did she do, what was the particular thing she did at that time?

A. She was always.

Q. (Int.) I was asking for a particular thing.

The COURT: Counsel is asking for a specific thing. It is certainly not responsive.

Mr. KINNEY: I note an exception.

263 The COURT: The answer may be stricken out; exception allowed.

(End of Page 123 Official Transcript.)

Mr. DAVIS:

Q. Will you be kind enough Mrs. Notley to answer the question? (Reporter reads last question.)

A. By frequently drawing Mr. Notley Sr.'s attention towards her.

Mr. DAVIS: That is not responsive your Honor.

Q. Then the mere fact—was it the fact that she paid attention to her uncle in drawing his attention towards her, that made you jealous?

A. I was not jealous of that.

Q. Had she up to that time done anything to your mother-in-law, or did anything outside of paying attention to her uncle?

A. Do you mean Miss Mullinger and the uncle?

Q. Of course?

A. They were frequently together.

Q. He and Miss Mullinger at that time?

Mr. KINNEY: I object to that. I ask that the jury will disregard that statement.

The COURT: The jury will disregard the statement reflecting on the credibility of the witness in this case.

Mr. DAVIS:

Q. Did Miss Mullinger at that time say or do anything to your mother that you saw?

A. Mrs. Notley, Sr.?

Q. Yes?

A. I was not the one that disliked her first.

264 Q. Did Miss Mullinger do or say anything to Mrs. Notley at that time that made you dislike her?

A. She was showing it.

Q. Did she say anything to her?

A. No.

Q. Did she do anything to her?

A. To Mrs. Notley?

Q. Did Miss Mullinger do anything to Mrs. Notley at that time?

A. No.

Q. What do you mean by paying attention to Mr. Notley?

A. She was constantly with him.

Q. Anything else?

A. Wherever he goes she is there with him. They went to Honolulu, Hilo and the Volcano, a place where he has never taken his wife.

(End of Page 124 Official Transcript.)

Q. I am talking of 1886; did he take her to the Volcano in 1886?
A. No.
Q. I asked you about the year 1886 when you first took a dislike, state any particular thing which Miss Mullinger did that caused you to dislike her to yourself or mother?
A. He paid more attention to her; whenever she wanted anything it was bought.
Q. Tell us any one thing he bought for her in 1886?
A. Finery, jewelries, fine dresses, hats, jewels, watch and gold chain and everything in 1886.
265 Q. That was all you took offense at was it?
A. And in the house the way she acted. I never saw her greeting my mother-in-law.
Q. In what way did she pay attention to Mr. Notley, by doing what?
A. Yes, trying all the loving ways she can charm him.
Q. A sort of Kahuna?
A. No.
Q. Was it a fact Mr. Notley gave her some dresses and the watch and chain; was it that which caused you to dislike this girl?
A. No, I tell you.
Q. Was it these same things caused you to dislike this young lady?
A. No.
Q. You will swear to that now?
A. Yes, I will swear to that. It was because she was trying to take away the rights of my mother-in-law in the house.
Q. Didn't you say that when I asked you for any particular thing, you mentioned Mr. Notley gave to her fine dresses and a watch and chain. Why did you answer in that way if you did not dislike her?
A. I didn't dislike her in that way.
Q. Will you swear that was not one of the reasons that caused you to dislike her?

(End of Page 125 Official Transcript.)

A. No.
Q. Why do you answer it that way?
A. Answer in which way?
266 Q. When I talked to you—when I asked you for a reason of any particular act or thing that caused you to dislike her? Why did you say Mr. Notley bought her dresses and the watch and chain?
A. You asked me what he bought for her?
Q. No. I said for any particular act. Now you say that was not the reason you had taken a dislike to her. Why did you answer me in that way.
No answer.
Q. Wasn't one of the reasons that you took a dislike to her wasn't it because she could get anything she needed.
A. No, I will swear to that.
Q. How old was this young girl when she came there to the house?

A. A little over fourteen years.
Q. Then she was about fifteen years of age when you took a dislike to her?
A. Yes.
Q. She hadn't charge of the house at that time?
A. No.
Q. How long did she remain there after she came from England?
A. She didn't remain there long.
Q. How long?
A. He took her to Honolulu in the spring of 1886.
Q. How long did she remain in Honolulu?
A. Four months.
Q. Then she came back?
A. Yes.
Q. How long did she remain then?
A. Two months.
267 Q. How long before she took charge as mistress of the house? It was not until after she came back in '95?
A. In 1892 I was away then.
Q. You don't know anything about that which took place when you were away? You went away in 1889?

(End of Page 126 Official Transcript.)

A. Yes.
Q. And remained away until 1885?
A. Yes.
Q. During those years you don't know what took place?
A. No.
Q. Who asked you to do some work for her?
A. Miss Mullinger herself.
Q. How long after she had come there was that?
A. Four months.
Q. Was there anybody present when she asked you?
A. No.
Q. What did the sewing consist of?
A. Material, calico material.
Q. What did you tell her?
A. I told her I could not do it, because I had three children on my hands.
Q. That was not the real reason was it?
A. No.
Q. The reason was that you disliked her?
A. That is when my father-in-law asked me why didn't I do work for her.
Q. But when Miss Mullinger asked you, did you tell her it was because you had to care for your children, you could not do it?
268 A. Yes.
Q. And that was not the reason, was it?
A. No, because I didn't like her.

Q. When did Miss Mullinger take charge of your children, to teach them?

A. She never did teach my children, I will swear to that.

Q. Neither the girls or the boys in the main house during any of the time?

A. No.

Q. Before you were living at the homestead,—your children were sent down to Honolulu to the Mist's, were they not in 1895?

A. Yes.

(End of Page 127 Official Transcript.)

Q. Your children were there?

A. Yes.

Q. Miss Mullinger was there?

A. Yes.

Q. And you will swear before they went to the Mist's Miss Mullinger didn't teach your children?

A. No.

Q. She gave them no lessons at all?

A. No, it was a Mr. Callendar. She gave no lessons, not to my knowledge.

Q. She never told you?

A. She never told me because I didn't frequent myself in the main building in 1895.

Q. You make a statement now that—I ask you now to
269 give you a chance—will you now positively swear she didn't teach any of them?

A. Not to my knowledge.

Q. But you didn't put that qualification in—you said that she never taught them, is that true?

A. It is true, not of my knowledge.

Q. But first you stated positively she never taught any of them?

A. Because they were taught in the public schools.

Q. Why do you add now, "of your knowledge?" Didn't your children tell you that she was teaching them before they went to the Mist's?

A. Just reading to them, that is what they told me.

Q. She read to them?

A. Yes, she read to them, I never seen that with my own eyes.

Q. What did she read to them?

A. I don't know what she reads to them. It might be scripture lessons, I don't know what.

Q. Anything else they told you she had done for them?

A. No.

Q. When Mr. Notley went to England first, who had charge of the business?

A. Mr. Keyworth.

Q. You made a statement here that when Mr. Notley went to England he gave the keys of the safe to your

(End of Page 128 Official Transcript.)

husband?

A. Yes, the small safe.

Q. Not the business safe?

270 A. No.

Q. Who had control of the business safe?

A. Mr. Notley, Jr.

Q. Didn't Mr. Keyworth have the keys of the safe, too?

A. No, he was the manager.

Q. He took control of the business during the absence of Mr. Notley in England?

A. Yes.

Q. The old lady, your mother, has always done and told you everything according to the Hawaiian fashion, had she not?

A. No.

Q. She had not?

No answer.

Q. You said in answer to some questions that your mother sometimes didn't eat at the table, she ate by herself?

A. When she is pushed with work.

Q. And then she ate native food, did she not?

A. Well, when she is obliged she might have her native eatables.

Q. Then she ate by herself?

A. Sometimes, that is, when we wanted to have Hawaiian eatables.

Q. Then she was not always at Mr. Notley's table eating haole fashion?

A. She was there when she is not pushed with work.

Q. When she took native dishes, did she eat them that you saw at Mr. Notley's table?

A. Sometimes alone, sometimes others are with us.

Q. Didn't she frequently take native dishes?

271 A. Sometimes.

Q. How many times a week?

A. That I don't remember, because I didn't count how many times she eats.

(End of Page 129 Official Transcript.)

Q. You can give us an idea of how many times a week?

A. Perhaps once or twice a day.

Q. And once or twice a day she would be absent from the table and Mr. Notley and the other members of the household would eat alone?

A. Yes.

Q. In 1895, your husband had some trouble in Hilo in connection with the Custom House, did he not?

A. All that I know.

Q. (Int.) He had some trouble?

A. I don't know if he had any trouble.

Q. You will swear to that?

A. I will swear to that.

Q. Didn't he ever tell you he had trouble in the Custom House?

A. No, all that I know, he said he is pau from the Custom House.

Q. Don't you know Mr. Notley was compelled to pay the sum of $7,000 for him?

A. No, I will swear to that.

Q. When did you first learn of this?

A. This is the first time I heard it, from your mouth. I didn't hear it yesterday in the courthouse. I was not present.

272 Q. You swear that you don't know that your husband had trouble in connection with the Custom House?

A. I will swear to that positively.

Q. Did he not tell you he was pau with the Custom House? Give us the words.

A. Well, "I am out of the Custom House." That is all he said. He said "I am out of the Custom House."

Q. Why do you say "I am out of the Custom House?" Why do you answer me that way?

A. I thought it would be the same. "Pau" and "out" is the same.

Q. Was that in answer to the question I put to you,

(End of Page 130 Official Transcript.)

or did he volunteer that statement? You haven't said anything before that?

A. No.

Q. Did he state any reason?

A. No.

Q. And you don't know the reason or don't care?

A. No.

Q. What was he doing then; living there after he left Hilo, was he living at home in 1895 after he was pau with the Custom House?

A. He left Hilo and went back to the home.

Q. It was in Hilo he told you he was pau with the Custom House?

A. Certainly.

Q. And you swear that you don't know the reason?

A. I don't know the reason.

273 Q. Then, after he left the Custom House, that was in 1895, you went back home?

A. Yes.

Q. You and Miss Mullinger were good friends at the time, were you not?

A. No. Miss Mullinger was there.

Q. You will swear that you were not good friends?

A. No.

Q. Didn't you tell Miss Mullinger at the time of the trouble you had between you and your husband on account of some young lady in Hilo?

A. No, I will swear I didn't.

Q. Do you remember one evening and is this not true——

Mr. KINNEY: I want to ask what this has to do with undue influence in 1889. I submit discussion regarding some young lady

in Hilo is entirely irrelevant and immaterial, and is not cross examination.

The COURT: A question of that kind is not proper cross examination unless it relates to some matter in the direct examination. The objection is sustained as not being proper cross examination.

Reporter reads last question.

The COURT: Well, the ruling is withdrawn as there is no question asked.

(End of Page 131 Official Transcript.)

MR. DAVIS:

Q. Do you remember whether or not—you have sworn that you and Miss Mullinger were not good friends?

274 A. Yes.

Q. Do you remember one evening shortly after you came back from Hilo that your husband was beating you with a stick Miss Mullinger came into the cottage and took the stick from your husband and called him a coward?

A. No.

Q. You will swear that never took place?

A. I will swear to that.

Q. And that one of the girls—you say that Miss Mullinger didn't come to your cottage in answer to the summons you sent out on that evening?

A. Never.

Q. And your husband had not stick and hadn't beaten you?

A. No.

Q. On the evening I speak of, wasn't your husband lying on the bed and you on the lounge and didn't you tell Miss Mullinger that your husband had been beating you and that she took the stick away from him and called him a coward?

A. No such thing ever happened.

Q. You were on speaking terms during 1895 with Miss Mullinger?

A. Very little.

Q. You refused to go to Miss Mullinger's wedding?

A. Yes.

Q. You were invited?

A. Never.

Q. Nobody sent you an invitation?

A. No.

275 Q. Your children were the bridesmaids at Miss Mullinger's wedding?

A. One.

Q. You said that no Hawaiians visited the house after 1892 when Miss Mullinger took charge?

A. I was not there.

Q. Well in 1895 were there Hawaiians visited the house?

A. Yes, but not the main building.

Q. Will you swear no Hawaiians visited the house in the main building?

(End of Page 132 Official Transcript.)

A. Unless on business.
Q. And after 1895 never went in the main house?
A. No.
Q. Were the Miss Lows there after 1895?
A. I did not see Miss Low there after 1895. I heard she was there when Mrs. Dauford was married.
Q. Now when Miss Mullinger was there you will swear that the Lows were not there, when she was there?
A. I don't know of my own knowledge.
Q. Why did you swear no Hawaiians visited the main house after 1895 when she took charge? Why did you swear that a few minutes ago?
A. Not to the main house.
Q. You will swear the Lows were not at the main house?
A. They may have been there. I may have been out.
Q. Why did you say no Hawaiians visited the main building?
276 A. Not the main building, but as far as my father-in-law's office.
Q. Then Hawaiians didn't visit the main building after 1895? Were not the Miss Lows there after 1895?
A. Not to my knowledge.
Q. Will you swear they were not?
A. I will.
Q. Were the Miss Roses of Hilo at the main house there?
A. They were put up there for the night.
Q. Weren't they entertained by Miss Mullinger?
A. By Mrs. Notley.
Q. Then there were Hawaiians in the main building after 1895?
A. Just strangers.
Q. Never mind. But they were weren't they?
A. Yes.
Q. Why did you swear none were there? You can't explain. Why did you answer that?
A. I answered your questions.

(End of Page 133 Official Transcript.)

Q. Can you explain, when you said no Hawaiians visited there after 1895 that you knew the Roses were there?
A. They came there when passing.
Q. Explain why you said no Hawaiians were there?
No answer.
Q. Weren't they there and entertained of nights?
A. Yes.
Q. You can't explain it can you?
A. No.

277 Q. You say that the old gentleman struck the old lady in 1888?
A. Yes.
Q. Who was present?
A. Myself, Mr. Notley Jr., Miss Mullinger and Mrs. Lightfoot standing under the pear tree.
Q. Nobody else was present?
A. Mr. Lightfoot saddling his horse.
Q. When he struck her?
A. Yes.
Q. You say that time that you heard Miss Mullinger say to her uncle "Drive that black woman out of the yard, do Uncle, do."
A. I did hear that dist'netly with my own ears.
Q. Did anybody else hear?
A. Mr. Notley Jr.
Q. Mr. Lightfoot must have heard it?
A. Yes, because he was within hearing.
Q. How old was this young girl?
A. Sixteen.
Q. Had your aunt and her any trouble previous to that? Did you ever hear her call her a black woman before or afterwards?
A. No.
Q. Only on that special occasion?
A. Yes.
Q. And you will swear that Mr. Lightfoot heard her say that?
A. I won't swear to that.
Q. Did she say it in a loud tone of voice?
A. Yes, said it in a loud voice.

(End of Page 134 Official Transcript.)

278 Q. How far was Mr. Lightfoot away?
A. I can not tell you.
Q. You say he was saddling his horse?
A. Near by.
Q. Close enough to hear?
A. Yes.
Q. Did you ever see Mr. Notley strike his wife before?
A. Never.
Q. What was that trouble about?
A. About the striking of her?
Q. Yes.
A. About the crockery ware that belonged to me that had been taken up to the Lightfoots.
Q. Given to him?
A. No, he took them because I was in Honolulu. I left my things in the cottage.
Q. And when you came back the stuff was up there and your mother went to get it?
A. Yes.
Q. Where was Miss Mullinger at the time?
A. At the table having lunch.

Q. How did she come to get up to where the Lightfoots were?
A. She knew my mother-in-law was stunned and she rushed up to the Lightfoots.
Q. Where was Mr. Notley?
A. At the table.
Q. Did he rush up, too?
A. Yes, rushed up to his wife and told her to stop this taking away the crockery and threw knives and forks at her from the table.
Q. Did he strike her with his fist or open hand?
279 A. With his fist.
Q. You never heard this young lady speak disrespectfully like that to her aunt before?
A. Never.
Q. That was 15 years ago. Are you positive as to the words she used, "Drive that black woman out of the yard?"
A. Yes.

(End of Page 135 Official Transcript.)

Q. "Do, uncle, do?" You are positive that was the exact language she used?
A. Yes.
Q. What did Mr. Notley say to that?
A. He was in a fury. He didn't hear Miss Mullinger saying that.
Q. But he was close by.
A. I didn't say he was close by.
Q. How far was he away?
A. He was in the dining-room—Mr. Notley was talking to him upon the matter, no, he had struck his wife and Mr. Notley Jr. took him around the house.
Q. Where was Mr. Notley when she said that?
A. Quite a distance from her when she said that.
Q. How far?
A. I can not tell you.
Q. Where was she when she said it?
A. Well, in Hamakua.
Q. But in what part was it?
A. Under the pear tree,—a distance from where Mr. Notley was. She was under the pear tree.
Q. Where was her uncle when she said that?
280 A. On the mauka corner of the dining-room in the yard. My mother was lying down.
Q. How far was Mr. Notley from this young lady at that time?
A. I think from here to the corner there. (Pointing.)
Q. She sang out in a loud tone of voice?
A. Yes.
Q. Did you reprove her for that?
A. I did not say anything. I was too scared at the way he treated his wife.
Q. You say that Mr. Notley was throwing knives and forks at

your mother-in-law at the time? If he was outside the dining-room, where did he get the knives and forks there?

A. He was at the table at the time she came in with the crockery ware.

Q. It was then he threw the knives and forks?

A. Yes.

Q. When she brought the things in she went out again?

A. Yes.

(End of Page 136 Official Transcript.)

Q. Why would she bring the crockery in the main house instead of to you?

A. I was there.

Q. Where were you at the time your mother-in-law came with the crockery?

A. In the next room.

Q. Where did she leave the crockery?

A. In the cupboard.

Q. Was it before or after she put them in the cupboard
281 that your father-in-law threw knives and forks at her?

A. After she put these things away and when she was turning and came back for some things my father-in-law said to her not to take any more things. She started to go then. I didn't rush out until after I heard the click of the knives and forks on the floor. I heard her saying, "What do you mean by throwing knives and forks at me?" She was to the kitchen door when he struck her. Miss Mullinger had gone up to the Lightfoot's.

Q. She rushed out and didn't see your uncle strike his wife?

A. That I can not swear.

Q. And yet you say that when you saw him strike her, after that she sang this out?

A. Yes, as Mr. Notley Jr. was taking his father away.

Q. Then you say Miss Mullinger went on to the Lightfoot's?

A. She was already up there.

Q. And that is the time she sang out, "Drive this old black woman out?

A. As she was standing under the pear tree.

Q. She was coming back when she said this?

A. Yes.

Q. How long was she at the Lightfoot's?

A. I don't know how long.

Q. How long when this trouble about throwing knives and forks —how long after was it your father-in-law struck her? It all hap-

(End of Page 137 Official Transcript.)

pened in two or three minutes?

282 A Yes.

Q. How far was the Lightfoot cottage from there?

No answer.

Q. Was it a hundred yards, twice the length of this court-house?

A. I think it is as far from here to the upper street there. (Pointing outside.)

Q. And how far was it to the pear tree?

A. Not very far.

Q. When she was coming back, had been up there and came back, did Mr. Notley strike his wife while she was up there?

A. Miss Mullinger?

Q. Your father-in-law strike Mrs. Notley while Miss Mullinger was up at the Lightfoot's?

A. I didn't notice.

Q. Do you remember the circumstances connected with the affair at all?

No answer.

Q. How long was your mother-in-law on the ground after she was struck?

A. I think fully two minutes.

Q. How many minutes?

A. Fully a minute or two minutes.

Q. And you will swear that girl had time to go up to the Lightfoot's and come back to the pear tree and sing this out while your mother-in-law was on the ground?

A. Yes.

Q. Did you ever hear Mrs. Danford ask your father-in-law to make a will?

283 A. Later on?

Q. At any time did you ever hear her ask him to make a will?

A. Never.

Q. Did you ever hear her suggest how he should leave his property?

A. It is impossible for you to ask me these questions, because I was never on good terms with Miss Mullinger.

Q. I want you to answer.

(End of Page 138 Official Transcript.)

A. I kept away from the main building.

Q. Did you ever hear Mrs. Danford ask Mr. Notley how he was going to leave his property?

A. What Mr. Notley?

Q. Mr. Notley, Sr. Did you ever hear Mrs. Danford at any time during your residence there, ask Mr. Notley how he was going to leave his property?

A. No.

Q. Never was there anything said by her in your presence about how he should leave his property?

A. I didn't have any consultation with my father-in-law about his——

Q. (Int.) I asked you about Mrs. Danford at any time?

A. I am not with them all the time.

Q. I am asking you when you were there, at any time did you ever hear her suggest such a thing?
A. As making a will?
Q. Or disposing of his property?
No answer.
Q. Did you ever hear Mrs. Danford say anything to Mr. Notley about disposing of his property?
284 A. Her asking him to leave some of his property to her?
Q. Yes.
A. No.
Q. When Miss Mullinger became Mrs. Danford she left for Honolulu?
A. Yes.
Q. And the two young ladies there went in the main building and took charge of your uncle's house?
A. Grandfather's house, yes.
Q. And remained there until Charles Notley died?
A. Yes.
Q. They were in full charge?
A. Yes, under the supervision of their grandmother.
Q. Before Charles Notley Sr. died, Mrs. Notley went to Honolulu?
A. Yes.
Q. I suppose you children were constantly there and took care of their grandfather when Mrs. Danford left?

(End of Page 139 Official Transcript.)

A. I think so.
Q. Were they not treated in the same way Miss Mullinger was treated?
A. Treated in a loving manner.
Q. Were they treated in the same way Miss Mullinger was? I mean as far as what they wanted and the management of the house, etc.
A. I was not there.
Q. Did you ever hear complaints from them about the way they were treated by their grandfather after Mrs Danford left?
A. Yes.
285 Q. Did they remain there?
A. Yes.
Q. With their grandfather until he left for Honolulu.
A. How do you mean—they make complaints to me about their grandfather?
Q. Yes.
A. I was away.
Q. Did they ever make complaints about the way in which their grandfather treated them during the two years Mrs. Danford was married?
A. No.
Q. Why did you say yes?
A. Well, I thought you——
Q. (Int.) Well you are under oath. Why didn't you take time?

The COURT: Give the witness a chance to explain, Judge Davis.

Mr. DAVIS:

Q. Did Miss Mullinger ever have servants of her own in that house?
A. She had servants.
Q. Of her own, I am speaking?
A. Yes.
Q. Who?
A. A Japanese woman.
Q. What Japanese woman?
A. Well, I can not name her. There are many servants in the house.
Q. I am asking about her own particular servant.
A. Maid you mean?

(End of Page 140 Official Transcript.)

286 Q. Yes.
A. No.
Q. All the servants there were employed and paid by Mr. Notley were they not?
A. By Miss Mullinger.
Q. Under the supervision of your father-in-law?
No answer.
Q. What do you mean by saying that Miss Mullinger's servant burned this album and those pictures?
A. That is the washerwoman and one of the servants of the house.
Q. Then it was not Miss Mullinger's servant?
A. Under her supervision.
Q. Wasn't she a house servant?
A. Probably. It may be so.
Q. Didn't you answer on your direct examination in answer to the learned and able counsel that the Japanese woman who burned the album was Miss Mullinger's servant?
A. Well, she was doing the washing.
Q. I will put the question again: didn't you — upon direct examination in answer to the learned counsel who is contesting this will that the Jap woman who burned the album was Miss Mullinger's servant?
A. Yes, I said that.
Q. Why did you say that?
A. Because she was under Miss Mullinger's control.
Q. But, you don't mean that she was Miss Mullinger's private servant?
A. No.
Q. But you said that?
287 A. I did not say she is a private servant. I said she is Miss Mullinger's servant, because she is always under her control.
Q. Well, your father-in-law had control of the servants, hadn't he?
A. Over the stable boy.

Q. And his own servants in his own house?
A. She had full control of the servants in the main

(End of Page 141 Official Transcript.)

building.
Q. Didn't Mr. Notley have control of his own household?
A. It was Miss Mullinger.
Q. Did not Mr. Notley ever give the servants any orders?
A. He gave them orders to fix the carriage by Miss Mullinger.
Q. To the servants around the house? Will you swear they never received orders from Mr. Notley?
A. Sometimes they do.
Q. Why do you want this jury to believe it was always Miss Mullinger? Explain that.
A. Because I never knew my father-in-law to have servants in the house, neither a yard boy, until Miss Mullinger came into the family.
Q. Who gave the Jap woman this old album to burn up?
A. I don't know who gave it to her.
Q. You said that in answer to the learned counsel here, that Miss Mullinger said to you, you ought to be thankful she got your
288 children to be educated. Wasn't it a fact that she said you ought to be thankful that she took your children and taught them?
A. She didn't take my children to teach them.
Q. I am asking you, didn't she tell you that instead of this? "I ought to be thankful that she got my children to be educated?" I ask you now if what she said wasn't this: "You ought to be thankful I took your children to teach them?" Miss Mullinger said to you?
A. I said "I ought to be thankful?"
Q. Didn't Miss Mullinger say to you, "You ought to be thankful I took your children to teach them"?
A. She said that to me, and I said "In what way did you educate my children?"

(End of Page 142 Official Transcript.)

Q. She told you that "You ought to be thankful she took your children to teach them?
A. No. If they were educated, she never told me she taught them.
Q. You were there all the time in 1895, you were at home? Where were your children in the day time?
A. In the cottage.
Q. What time did they leave the cottage in the morning? Didn't they spend a good deal of their time in the main house?
A. No, very little.
Q. Wouldn't your children leave the cottage at nine o'clock in the morning apparently to go to the main house with their books?
A. Not to my knowledge.
Q. You will swear that they didn't?
A. Yes.
289 Q. And that they didn't stay in the main house from 9 until 12, and that Miss Mullinger was teaching them?

A. Not to my knowledge; with Mr. Callendar, that is what they went to school and came back at 12 o'clock.
Q. Did they go to the main house, I am asking you?
A. To be taught by Miss Millinger?
Q. Answer the question. Don't let your hatred of Miss Mullinger —did the children leave your cottage to go to the main house at 9 o'clock?
A. For what?
Q. I am asking you.
A. Sometimes they go there.
Q. Didn't they every morning leave and go from the cottage to the main house at nine o'clock?
A. To the Callendars. I know that.
Q. Didn't they go to the main house with their school books?
A. No.
Q. At no time?
A. No, at no time.

(End of Page 143 Official Transcript.)

Q. Was Mrs. Danford at home when this garden was torn up?
A. Yes.
Q. She was home?
A. I was away, I think she was home, though. I was away at the time the garden——
Q. (Int.) Why did you answer when I asked you if Miss Mullinger was home when the garden — torn up, why did you say "Yes"?
A. She must have been there.
290 Q. And you don't know, do you?
A. No.
Q. Why did you say she was there?
A. Because she was not in Honolulu where I was living.
Q. You went and told a long story about this rose garden?
A. No, I didn't.
Q. Didn't you tell how the rose garden was planted to Mr. Kinney?
A. Very little I told. I was interrupted.
Q. Was the rose garden done away with?
A. It is not there.
Q. Who took it away? You don't know?
A. I don't know.

Mr. CECIL BROWN:

Q. Who paid for the schooling of your children while they were at the Mist's?
A. Their grandfather, Mr. Notley, Sr.
Q. And from 1895 to his death, who paid for the care, maintenance and care and keep of those children?

Mr. KINNEY: I object to that. That is too profuse.
No answer.

Mr. CECIL BROWN:

Q. Then from the time they went to live there, from 1895 until the death of Mr. Notley, who paid—who took care of the children of the widow, who paid for them—from 1898, after her marriage, up to his death?

A. Up to his death who paid their school?

Q. No, from the time Miss Mullinger became Mrs. Danford, or was married, up to the time of the death of Mr.

(End of Page 144 Official Transcript.)

Notley, who took care of your children and paid the bills?

291 A. Excuse me, I don't hear.

Q. After the marriage of Miss Mullinger, when she became Mrs. Danford in 1898, up to the death of Mr. Notley, last year, who paid for the support of your children, who paid the bills while living at the homestead at Paauilo?

A. Bills and schooling?

Q. Everything in connection with them there?

A. He paid their schooling. I paid part of their bills.

Q. And the rest what you didn't pay their grandfather paid?

A. Yes.

Q. During that time, these children lived with the grandfather and grandmother? Did you have any complaint from them as to their friction with their grandfather or grandmother?

A. No.

Q. Was there any complaint on any score by these children for anything?

A. I don't know.

Q. So that, everything, so far as you know, went on nicely among the people up there?

A. Yes.

Mr. DAVIS:

Q. Which one of these young ladies was bridesmaid for Mrs. Danford when she was married?

A. My eldest daughter.

Q. Did you know she was going to act as bridesmaid?

A. Yes.

Q. Did you help to dress her for the occasion?

A. No.

292 Q. You consented to it?

A. I didn't have anything to do with it.

Q. You were mad about it, were you?

A. No.

Q. Were you pleased?

A. I didn't very much care about it.

(End of Page 145 Official Transcript.)

Q. Then you must have been mad, eh?

A. No.

Q. You were not mad or you were not pleased?
A. I didn't very much care for it.
Q. Then you must have been angry about it?
A. No.
Q. What do you mean? Explain that, when you say that you don't much care or you were not angry or pleased?
A. She went as a bridesmaid for Miss Mullinger. I didn't care for her very much being a bride for Miss Mullinger.
Q. Were you angry about it?
A. No.
Q. Were you pleased?
A. Not very pleased.
Q. Then you must have been angry?
A. No.
Q. Now didn't that demonstrate to you those two young ladies were on good terms when she invited her to be her bridesmaid?
A. I don't know about that.
Q. Isn't that the highest honor one young lady can pay to another?
A. I suppose that is the highest honor.

293 An adjournment was here taken at five p. m. until Monday morning at nine o'clock.

MONDAY, *January* 26, 1903—9 a. m.

Jury and counsel are present. Mrs. Emma Notley on the stand.

Mr. BROWN: We have no further questions to ask the witness on cross examination.

(End of Page 146 Official Transcript.)

Mr. CECIL BROWN, called and sworn on behalf of contestants, testified as follows:

Mr. KINNEY:

Q. Mr. Brown, after the death of Mr. Charles Notley, was any search instituted for proof that another will had been drawn?
A. In my office there was. I don't know of any other.
Q. No search was made through Mr. Hartwell's records?
A. I don't know about that myself.
Q. You didn't direct any search?
A. Not at all—I can only tell by hearsay what Mr. Hartwell——
Q. (Int.) From associate counsel?
A. Yes.
Q. When that will was opened both sides were represented by attorney?
A. You were there and Mr. Notley and Mrs. Hughes.
Q. And Mr. Stanley for Mrs. Danford?
294 A. Yes, and I was there. The will was in my custody and you were representing the wife and children and Mr. Magoon was there representing Mrs. Hughes.

Q. You knew enough of the situation to know that both sides expected a contest at that time?

A. I didn't.

Q. Was it long after that you knew it?

A. I think after the will was read you made some remarks to me, not about a contest, but another matter, I think two or three days afterwards you told me.

Q. There was a protest at the time entered by Mrs. Hughes?

A. Mrs. Hughes said it was an unjust will.

Mr. DAVIS: That is not evidence what Mrs. Hughes said. I object and move it be stricken out.

(End of Page 147 Official Transcript.)

The COURT: It may be stricken out.

W. L. STANLEY, sworn on behalf of the contestants, testified as follows:

Mr. KINNEY:

Q. Mr. Stanley, as attorney for Mrs. Danford, after the death of Charles Notley, did you institute any search or cause a search to be made through any papers or books of Mr. Hartwell?

A. I did not do it myself. I had Judge Hartwell do it. I wrote him first in the east.

Q. As a matter of fact in his office books or otherwise, was there any record of his having ever drawn a will?

A. There was not. I am only stating the results of the search as reported to me by Mr. Hartwell.

Q. And as the results of your search you could get no information at all of the existence of a will?

295 A. No, none at all. I will say this: I got the information there was no charge in Mr. Hartwell's fee book and that he had no recollection of having drawn a will.

Q. Your knowledge is that the fee is the last thing they forget to enter?

A. The charge is the last thing they forget. I can not say that it is in my practice.

Q. Did you work for Mr. Hartwell?

A. Yes, and I can not say that I ever remember his forgetting to make a charge.

Mr. Cecil Brown was here further interrogated (in his seat) by Mr. Kinney.

Q. When you say that if there was a paper that was destroyed, is that based simply upon your methods?

A. My methods, that is my custom.

Q. But not upon any independent recollection of having done anything in that regard?

A. I can not say that it is an independent recollection. All I know is that there was another will. And the only change made in

(End of Page 148 Official Transcript.)

that will be given to me was the substitution of the children of Charles Notley in its place.

Q. Did you testify as follows in the lower court: "A. I have an indistinct recollection Mr. Notley brought me a formal will that was drawn up by Judge Hartwell?"

A. That is right.

Q. "That is a will that was executed?" The answer to that is, "That is my recollection." "Q. Do you know what became of that will? A. It is a habit of mine when a new will is executed to destroy the old will."

296 A. That is my rule.

Q. And that evidence correctly states your recollection regarding that will?

A. So far as my recollection goes that states it. I could not tell you who were the witnesses to save my life.

Q. On that your mind is a blank?

A. Yes.

Q. Do you mean it was a draft of a will unsigned?

A. It might have been. I can not say it was, from recollection, as it was a will.

Q. It may have been as far as your memory is concerned, it may have been a will unsigned, unexecuted?

A. It may have been.

Q. And on the question of the date your mind is an absolute blank?

A. I could not more tell it than I could fly out of this room.

Q. It may have been drawn a week previously?

A. It may have been drawn ten years previously.

Cross-examination.

Mr. DAVIS: If you destroyed it, it would be at the request of the testator?

A. Well, he was present, the new will was made and

(End of Page 149 Official Transcript.)

of course the other will was destroyed.

Q. It was at the request of the testator, either expressed or implied?

A. It must have been.

(End of Page 150 Official Transcript.)

297 Mr. JOHN TAVARES, sworn on behalf of contestants, testified as follows:

Mr. KINNEY:

Q. Mr. Travares, how old are you?

A. I am twenty-five years old.

Q. How old were you when you came to this country?

A. Five years old.

Q. Where did you first live then?

A. Paauilo, Hamakua Plantation.

Q. Where were your parents, your father and mother, at that time?

Mr. DAVIS: I object to this. What difference does it make about his parents?

The COURT: I assume this is merely preliminary. I overrule the objection.

Mr. KINNEY:

Q. Where was your father and mother at that time?
A. In Mr. Notley's yard.
Q. Which Mr. Notley?
A. Old man Notley.
Q. Who is dead?
A. He is not there now.
Q. He is dead?
A. Yes.
Q. Where is your father now?
A. My father is on the bed, Paauilo.
Q. Sick?
A. Yes, awful sick.
Q. Was he subpœnaed?
A. Yes, the deputy sheriff went to subpœna him, but he saw his condition and didn't subpœna him.

298 Q. How many years did you work with your father in the Notley yard?

A. I began to go round in Mr. Notley's yard, that is, doing some little work, when I was nine or ten years old.

Q. And you continued until when?

A. I continued until I was fifteen years old, that is to do a little work; before I go to school and after I come

(End of Page 151 Official Transcript.)

from school, I used to help my father.

Q. Are you acquainted with old lady Notley?
A. I do, sir.
Q. And Mrs. Danford?
A. I do, sir.
Q. When you were at work in the Notley yard, as you say, did you see these two ladies around?
A. Oh, yes, I see them lots of times a day.
Q. During that five years or so, what were the relations between Mrs. Danford and the old lady, friendly or not?
A. It seems to me they didn't look friendly.

Mr. DAVIS: I object to this as a conclusion of the witness and ask that the answer be stricken out.

The COURT: The answer may be stricken out as being hearsay and the opinion of the witness.

Mr. KINNEY:

Q. What did you see with your eyes?

A. The reason I say this is because that whenever Mrs. Danford would pass and Mrs. Notley come from one way and Mrs. Danford from another way, they didn't look at one another.

Q. How often about was that?

299 A. A good many times.

Q. What do you mean by many times?

A. I mean every time I met both of them, I never saw no conversation between them two, and no good faces.

Q. During that time how was—not when passing? each o'ner, who generally—how was Mrs. Notley's face, a good face or not?

A. She has been kind faces all the time, that is to me or my father—

Q. How was her face as to being happy or not?

A. How was the face?

Q. Was she happy or not?

(End of Page 152 Official Transcript.)

Mr. STANLEY: We object to that as calling for an opinion of the witness as to the happiness of Mrs. Notley.

The COURT: Well he might tell from her facial expression whether or not she is contented or not. Unless it is indicated in what way her feeling was indicated. The objection will be sustained. The objection to the last question will be sustained, Mr. Kinney.

Mr. KINNEY:

Q. Mr. Tavares, where did Mrs. Notley spend most of her time in the yard?

A. Most of the time at the ironing-room, doing the washing in the washing-room and most of the time in the ironing-room.

Q. Did you see her often when she was there in those places?

A. Yes, sir.

Q. What was she doing besides ironing and washing, if anything?

300 A. She is always got something to do, that is, ironing and washing, but while she is having a rest, may be she has not clothes to iron, lots of times she cry.

Q. Was anyone ever present besides yourself or near by on any of those times when she was crying?

A. Well, sometimes I was to cut by the machine the tennis play grass, sometimes she was crying. Sometimes Mr. Notley was alongside, sometimes Miss Mullinger and I could see and hear she is crying, because she is not so far from the tennis play.

Q. How many times have you heard her cry when Miss Mullinger was present?

A. I can't tell how many times, because I never take any notice.

Q. Was it many or few times?

A. It was not a few times. It was many times.

Q. What attention, if any, did Mrs. Danford pay to this crying?

A. It looked to me, no attention.

(End of Page 153 Official Transcript.)

Q. Did you see or notice any attention on her part?
A. I never saw it.
Q. Did she do anything besides cry?
A. Sometimes she talked by her own self. Cry and talk.
Q. Who was present when she would talk to herself and cry?
A. I was present, alone.
Q. Any one else?
A. No one else when she talked.
301 Q. How frequently would you find her talking to herself?
A. A good many times she was talking.
Q. Have you ever seen the old lady and Mr. Notley talking together?
A. Many times.
Q. Where?
A. Different places. Sometimes talked near the iron room, sometimes at Mr. Notley's veranda, and sometimes near by the lawn tennis court.
Q. The lawn tennis court?
A. Yes, sir.
Q. Have you on any such occasion seen Miss Mullinger?
A. Yes, sometimes Mr. Notley is talking with Mrs. Notley, and afterwards I hear sometimes a voice say "Uncle," and call for Uncle and call for Uncle and Uncle would let Mrs. Notley alone and walk away.
Q. How often did you see that done?
A. A good many times in all that time I had been there.
Q. Well, you say that you heard a voice. Whose voice was it calling, "Uncle"?
A. Mrs. Danford's voice.
Q. Had you on any such occasion seen her?
A. Yes I had.
Q. Under what circumstances?
A. Sometimes she would be at the back yard calling "Uncle," sometimes on the below side of the iron room, sometimes from Mr. Notley's house, that is where the voice comes out. Sometimes I do hear Miss Mullinger again calling "Uncle," and then Mr. Notley has to go.

(End of Page 154 Official Transcript.)

302 Q. When he is in conversation with his wife?
A. Yes.
Q. In this conversation—did you ever hear this conversation?
A. No sir. I never stayed near by.
Q. Was there anything to indicate whether they were angry or pleased?
A. It seems to me they were not angry.
Q. Why not?
A. Because Mrs. Notley is always too broke down. That is, sorry like a pain that is in her, that is the way she talks with Mr. Notley.

Mr. STANLEY: I think this is even going beyond the limit of

facial expression as indicating pain and sorrow, etc. I move it be stricken out as irrelevant and immaterial.

The COURT: I think it may be stricken out as to the statement of Mrs. Notley's having a pain in her and the jury instructed to disregard it.

Mr. KINNEY:

Q. How was Mr. Notley in this conversation?

A. He was in his own way, that is all right on his side. There is no sorrow with him.

Mr. STANLEY: I ask that be stricken out for the same reason, and the jury instructed to disregard it, as a conclusion of the witness, there is no sorrow.

The COURT:

Q. What do you mean by no sorrow in him?

303 The WITNESS:

A. When he talks Mr. Notley, he talks like he felt he has no sorrow.

Mr. KINNEY:

Q. What do you mean by expressing neither sorrow or anger?

Mr. STANLEY: I object to that as leading the witness.

The COURT: I think a leading question is upon direct examination sometimes permissible. I overrule the objection.

Mr. KINNEY:

Q. On any of these occasions when Mrs. Danford called her uncle, did he ever refuse to go that you remember?

A. Never refused as far as I saw, never refused to go.

(End of Page 155 Official Transcript.)

Q. Who took care of the garden on the place?
A. You mean the garden?
Q. The garden in the yard.
A. My father used to take care.
Q. Do you remember any occasion—what grew in that garden?
A. Flowers.
Q. What kind of flowers?
A. Roses.
Q. Are those roses there now?
A. No, sir, they are not?
Q. Where were the roses?
A. The roses were all around the yard, but especially on the below side of the house. There is where the most of the good flowers grow.

304 Q. What do you mean on the below side of the house?
A. That is on the below side of the sidewalk from the

gate that goes into the house, makai of the house, on the below side of the sidewalk.

(Mr. Kinney here shows the witness some photographs.)

Q. Will you please look at those photographs and say what they are photographs of?
A. This is Mr. Notley's house.
Q. How about that one? (Showing witness another photograph.)
A. This is the same house.
Q. Then they are both photographs of Mr. Notley's house?
A. Yes the same house, but different ways.
Q. In this picture I now point to. The picture I now hold, which way is that house fronting in reference to the sea, which is the sea side?
A. The sea side is here. (Indicating.)
Q. That is, the house is fronting towards the sea in the photograph I hold?
A. Yes sir.

Mr. KINNEY: The photograph I referred to I now offer in evidence as Exhibit 20.

(End of Page 156 Official Transcript.)

The COURT: It may be received in evidence and marked Contestant's Exhibit 20.

Mr. KINNEY:

Q. This photograph I now hold in my hand represents which end of the building?
305 A. It represents the Kohala side; this is the front of the house. (Showing) This is the front veranda of the house, (showing). This is the sidewalk that goes by the veranda of the house (showing).
Q. The front of this house as it is photographed here, is facing towards Kohala.
A. Yes, facing towards Kohala.

Mr. KINNEY: The photograph just referred to I now offer in evidence.
The COURT: It may be received in evidence and marked Contestants' Exhibit 21.

Mr. KINNEY:

Q. (Showing witness photograph.) Can you tell me what that is?
A. I am sure I can. This is the lawn tennis court and this is the house where a man named Nawai used to live, and this other house is the iron house where Mrs. Notley used to spend most of her time, that is the cottage in the left hand side of the picture—is changed, that house (indicating) this is the fence which——
Q. (Int.) Never mind. Which house is this?
A. This is the iron house.
Q. That is the house most on the left?

A. Yes, on the left.

Mr. KINNEY: I offer this in evidence.

The COURT: It may be received in evidence and marked Contestant's Exhibit 22.

Mr. KINNEY:

Q. Where were those roses? (Showing the witness photograph.)
A. On this side. (Showing.)

(End of Page 157 Official Transcript.)

306 Q. Any where else roses planted?
A. Yes, all around here. (Showing.)

Mr. KINNEY: He points to Exhibit 21 indicating both sides of the walk. (Marked with an x on photograph.)

Q. Where in that portion of the grounds, shown in Exhibit 20 were the flowers?
A. All around here. (Showing.)

(Marked by a straight line in ink on photographs.)

Q. Was there any other place where there were roses?
A. Yes sir. They were all around the yard there.
Q. What do you mean by all around the yard?
A. Where the lawn tennis court is now, there used to be all flowers there.
Q. Were you present when any of these roses were removed?
A. I was present on a part of it.
Q. Which part of it?
A. On the below side of the sidewalk, into the house on the makai side.
Q. Tell us what happened.
A. As I was there with my father; my father was told by Mr. Notley to pull those rose bushes off.
Q. Who was present when Mr. Notley told your father that?
A. Mrs. Danford was present with Mrs. Notley.

Mr. STANLEY: I would like to ask which rose bushes you were referring to now.

Mr. KINNEY: On the makai side of the walk.

307 Mr. KINNEY:

Q. When he told your father to pull up the roses, what then?
A. My father had gone to do the work; then Mrs. Notley come down and talked with Mr. Notley; then she was not crying, but you could see the tears rolling down her cheeks.
Q. Was she talking English or Hawaiian?
A. She was talking Hawaiian—well of course she can't talk English. I know she must have been talking

(End of Page 158 Official Transcript.)

Hawaiian.

Q. Where was Mrs. Danford when the old lady and Mr. Notley were talking?

A. At the time Mrs. Danford got there Mrs. Notley and Mr. Notley was together, after that Mrs. Danford walked in the house.

Q. How long after Mrs. Notley started talking to Mr. Notley that Miss Mullinger went into the house?

A. I can't tell, but it is about five minutes or so, just a short time.

Q. How long was she gone? After Miss Mullinger went into the house what became of her?

A. She got back in five or seven minutes.

Q. When she came back there where was Mr. and Mrs. Notley?

A. Well, when Mr. Notley—when she came back they were talking to one another still.

Q. What happened after Mrs. Danford came back?

A. They stayed there for a little while; Mrs. Notley left Mr. Notley and was crying hard, telling—that is after this job was done Mrs. Notley told me——

308 Q. (Int.) You can not tell that. When Mrs. Danford came back, what did she do?

A. Talked with Mr. Notley.

Q. After she talked with Mr. Notley what was done?

A. "Go ahead Jose and pull all of those rose bushes." That is the time Mr. Notley gave second orders to my father and I was present. That is when Mrs. Notley left the place and went away towards Nawai's house.

Q. How much of this rose pulling did your father do at the time; how much did he do?

A. That was in the afternoon.

Q. Well, after that, how much did he do?

A. After that, plenty.

(End of Page 159 Official Transcript.)

Q. In what localities? Where, in what part was it?

A. It is where the lawn tennis court is now and on the makai side of the house, that is on the mauka side of the side walk and at the back of the house.

Q. How was this taken out?

A. No sir, only a part of it, only this below the side walk when I was present, but when I come later, already they were pulled.

Q. How long after the first pulling you came and saw the other were gone?

A. Well, every day pull a little.

The COURT:

Q. How long was it afterwards that you came back, that you saw these roses were gone?

A. Well, every day I would go in the morning with my father's breakfast and see a little by little; after a month or so everything was pulled.

309 Mr. KINNEY:

Q. On the occasions when Miss Mullinger would call uncle

and the uncle would leave, what, if anything, would Mrs. Notley do?

A. It depends on the place she stands. If she is on the veranda, she stays there three or four or five minutes. Then if Mr. Notley don't come she gets up and goes, but in some other places whenever Mr. Notley leaves her, she walks through wherever she has something to do.

Q. What was her appearance at those times, how did she look?

A. She looked solemn.

Cross examination.

Mr. DAVIS: How old are you?

A. Twenty-five years of age.

Q. You never heard Mrs. Danford say anything cross to her aunt all the time you were there?

A. Who is her aunt, Mrs. Notley.

Q. Yes?

A. I never.

(End of Page 160 Official Transcript.)

Q. Or ever heard Mrs. Notley say anything cross to Mrs. Danford?

A. Never in my life.

Q. And the fact that they pased each other, did you notice them every time they passed to see if they spoke?

A. Yes, sir.

Q. What led you to do that?

A. Whenever I passed? Because I was surprised to see Miss Mullinger at the time in the yard and didn't speak with Mrs. Notley.

310 Q. And you watched them every time they passed each other, you will swear to that?

A. I do say when I passed, not every time——

Q. (Int.) Didn't you say a moment ago that you had watched them every time?

A. Every time I passed I look.

Q. Why?

A. Because I have got eyes in the front of my face.

Q. Didn't you have your work to attend to?

A. Yes.

Q. And the reason you looked at those two women was because you had eyes?

A. Yes, sir, that is all.

Q. And every time they passed each other you looked to see whether or not they spoke?

A. Of course I watched them and my eyes see as far as they could.

Q. Will you swear when you saw those two ladies in the yard they never saluted?

A. Yes sir.

Q. How many times did you see them pass?

A. Good many times.

Q. How many times?

A. I didn't take any idea.

Q. Did you see them three or four times or a hundred times?

A. That, is, I can not swear to that, I can't testify to that.

Q. Will you undertake to tell this jury during all the times you saw them pass they never spoke?

(End of Page 161 Official Transcript.)

311 A. Yes I will swear they never.

Q. And they never bowed?

A. Not in front of me.

Q. Did you see them in the house together?

A. I used to see Miss Mullinger in Mr. Notley's house; I never saw them in the house.

Q. What took place you don't know there?

A. No, sir.

Q. You will swear they never spoke when they passed you in the yard?

A. In front of me, no sir.

Q. And never looked?

A. They may have looked.

Q. Didn't you say in your direct examination that they never looked?

A. Never looked.

Q. Do you wish to correct that now?

A. That is the way—I can make the motion——

Q. I don't want you to explain.

The COURT: He has a right to explain.

A. What I wished to explain—I don't mean to say that they won't look; they have their eyes the same as myself and someone else, but whenever they pass, Mrs. Notley and Miss Mullinger one way, sometimes Mrs. Notley look to the ground.

Q. When you answered my question directly that they never looked, do you wish to qualify that?

A. They never looked sharp to one another.

Q. You wish to qualify your answer that they never looked or sometimes looked?

312 A. Not while passing, while I was present they didn't look at that time, while passing one another.

Q. Is that the only reason you have to give me that you have so closely observed these women while you were there attending to your work, every time they passed you, watching them to see if they looked or spoke?

(End of Page 162 Official Transcript.)

A. I was doing my work. I was not watching anybody there, but while I was passing these two persons it surprised me to see these two persons passing one another and they didn't look.

Q. Didn't you say to me that you always watched these two people passing, a few minutes ago?

A. I said that——

Q. (Int.) Didn't you say a few minutes ago that you always watched these two ladies in passing?
A. I didn't say that.
Q. Do you wish to qualify that?
A. Yes.
Q. You were not always observing when they passed, is that it? That is not true is it?
A. It is true, yes, sir.
Q. That you always observed them?
A. What does the word mean, "observe?"
Q. To look at them.
A. Yes sir.
Q. To see whether or not they spoke or looked?
A. Yes sir.
Q. Is that the only reason you have to give me why you did that?
No answer.
313 Q. Is that the only reason what you have already stated?
A. Yes, I was surprised.
Q. And every time they came you made it your business to watch them closely?
A. If I was present.
Q. Do you know Mrs. Notley didn't understand the English language?
A. Not as far as I know.
Q. She didn't understand English then, did she?
A. She may be, little, but as far as I know, she is not English talking, I never heard her speak English.
Q. You never heard Miss Mullinger speak Hawaiian?
A. Never.

(End of Page 163 Official Transcript.)

Q. Therefore they could not talk very much, could they, with those facts?
A. No, sir, with those facts they could not talk much.
Q. Therefore you could not hear much conversation?
A. Certainly not.
Q. The place where these roses were, when the tennis court was built, did that occupy the place occupied by those roses?
A. Yes, sir.
Q. Included the place?
A. Yes, sir.
Q. It was required for that purpose?
A. Yes, sir.
Q. Where did you put the roses when you took them up, plant them somewhere else?
314 A. No, put in a pile to burn them up.
Q. You didn't transplant them?
A. No sir.
Q. Had these roses been eaten by the bugs?
A. No sir.

Q. None at all? No bugs there?
A. There may be bugs by this time.
Q. No bugs there?
A. At any time there is bugs everywhere.
Q. And bugs on the roses?
A. We may find plenty this time. At that time it was a nice time for flowers.
.Q You swear do you that there was no bugs here?
A. There is no bugs, there is bugs everywhere.
Q. Were there bugs there?
A. I have not been to look.
Q. Did you look to see if the roses were eaten by bugs?
A. I didn't take any notice.
Q. You won't swear they were not eaten by bugs at that time?
A. I can swear to that.
Q. They may have been all eaten by bugs?
A. I can not say they were not eaten by bugs. I did not see any bugs on them.

(End of Page 164 Official Transcript.)

Q. You don't know if there were bugs on them?
A. No, I don't know. I will swear that they were good flowers.
Q. I ask you if you will swear they were not eaten by bugs at that time?
315 A. I did not take any notice.
Q. Where were you born?
A. At St. Michaels.
Q. Where do you work?
A. I work on the plantation.
Q. Were you talking about these things before you came here?
A. No sir, I don't know anything about it. I didn't know what I was coming for.
Q. You don't know yet?
A. I do know a little now.
Q. You never saw Mrs. Danford insult any members of the Notley family, you never saw Mrs. Danford insult any members of the Notley family?

Mr. KINNEY: I object to that as calling for a conclusion of the witness.

Mr. DAVIS:

Q. Did you ever hear her say anything cross to any of the Notley family?
A. Not that I heard of.
Q. Always conducted herself as a lady, what you saw?
A. What I saw, yes.
Q. How long were you in their employ?
A. Between nine and ten years.
Q. Will you undertake to swear that at no time when Mrs. Notley were passing in the yard they did not speak to one another?
A. I sworn that already. That is all pau.

Q. And when you saw them there, were you always close enough to hear?
316 A. Most of the time, that is, when I saw them pass towards the stable.
Q. Were you always close enough to hear?
A. Not every time.
Q. And yet you undertake to swear they never spoke?
A. When I saw them, no sir.

(End of Page 165 Official Transcript.)

Q. But you said there were times you were not close enough to hear. Will you undertake to swear then, they didn't speak?
A. I can not swear that much.

Mr. KINNEY:

Q. Who are you working for now?
A. Mr. Lidgate.
Q. The gentleman sitting here?
A. Yes sir.
Q. How did you come to Hilo?
A. I was subpœnaed by the deputy sheriff of Honokaa District of Hamakua.
Q. Prior to your coming here did you have any conversation with me or any of the Notleys about coming as a witness?
A. Yesterday, a little bit with Mr. Kinney in Hilo.
Q. Before you were subpœnaed, I mean, did you see anyone?
A. I didn't sir.
Q. Don't you know you got your subpœna?
A. Yes, and was then working for Mr. Lidgate.

Mr. DAVIS:

Q. Are you on friendly terms with the Notley's?
A. With everybody.
317 Q. Are you on friendly terms with the Notleys at the present time?
A. Yes, I am friendly with everybody.
Q. Are you on friendly terms with the Notleys at the present time?
A. I am, sir.

(End of Page 166 Official Transcript.)

Miss MARIA A. HUGHES, sworn on behalf of contestants, testified as follows:

Mr. KINNEY:

Q. Did you know Charles Notley in his lifetime?
A. I did.
Q. What was he to you.
A. My grandfather.
Q. How old are you?
A. I am 20 years of age.

Q. Where were you born?
A. Honolulu.
Q. Were you in Paauilo when you were very young?
A. Yes.
Q. Have you any very distinct recollections of Paauilo at that time?
A. No sir.
Q. When did you first become acquainted with Paauilo to know it; that is, your grandfather's home?
A. 1897.
Q. You were then how old?
A. 14 years.
318 Q. And how much of an acquaintance had you with your grandfather up to that time?
A. Very slight.
Q. What opportunities did you have of seeing him before that time?
A. On occasional visits to Kohala.
Q. When he would stop how long?
A. Two or three days.
Q. How many visits?
A. One or two to my recollection.
Q. Do you know Mrs. Danford?
A. I do.
Q. Had you any acquaintance with her prior to that visit in 1897 beyond knowing who she was?
A. No sir.
Q. How long a visit did you make to your grandfather's home in 1897?
A. Three weeks.
Q. Going from where?
A. From Kohala.
Q. Who was in the company?
A. Mrs. Danford, Miss Barnard and my cousin, Miss Notley.
Q. Keala Notley, the eldest daughter of Chas. Notley?
A. Yes sir.
Q. From your making Mrs. Danford's personal acquaintance, what were your feelings toward her, friendly or unfriendly?
A. Unfriendly.

(End of Page 167 Official Transcript.)

319 Q. Why so?

Mr. DAVIS: Are the reasons for her feelings towards Mrs. Danford unfriendly—is that evidence? I object to it if your Honor pleases.
Objection withdrawn later.

Mr. KINNEY:

Q. Why unfriendly, if you hadn't known her?
A. On account of talk between my parents.
Q. On the trip from Kohala to Hamakua was your unfriendly feeling overcome or not?

A. It was not.

Q. How, in reference to that, what were the relations between you two on that journey?

A. Well we were——

Q. (Int.) Was there any tiff or anything of the kind?

A. Yes.

Q. During that three weeks stay did you hear any remarks made by Mrs. Danford in reference to your mother?

A. Yes.

Q. What was it?

A. She remarked to my cousin; at least she asked my cousin whether she wouldn't prefer to have others in the house outside of me, and also she was more to my grandfather than my mother was there.

Q. You heard that yourself?

A. I did; yes, sir .

Q. When did you first—How did you first come to know about her wishing you away, was it?

Mr. BROWN: The evidence of the witness as to what she
320 asked her cousin should be stricken out. (No ruling given.)

Mr. KINNEY: Wishing her out of the house? What cousin? Keala?

Mr. BROWN: That is what I want to find out. That was my objection.

Reporter reads question.

Mr. KINNEY:

Q. When you said that you heard that yourself, to what did you refer?

A. To the conversation that took place in the house between Mrs. Danford and Keala. I came in the room at the time Mrs. Danford made the remark to Keala,—wouldn't she prefer to have others in the house besides

(End of Page 168 Official Transcript.)

me—and that Mrs. Danford was more to my grandfather than my mother.

Q. Then did anything else occur after that about your going home ahead of time?

A. Yes.

Q. What was it?

A. On the occasion that my grandmother wailed.

Q. Who was present? Had you heard your grandmother?

A. Lillie, Keala, Mrs. Danford and myself.

Q. What, if anything, did Mrs. Danford say?

A. She asked Keala what the matter was with grandmother and Keala went out of the room to find out, and she came out and told us that grandmother had cried because Mrs. Danford was trying——

321 Q. (Int.) Was Mrs. Danford present at the time?
A. She was.
Q. Go on, now.

Mr. STANLEY: As a statement of what somebody else told them outside, is that evidence, your Honor? I object to that as being incompetent, and inadmissible, and hearsay.
The COURT: The objection will be sustained.
Mr. KINNEY: I note an exception.
The COURT: Exception allowed.

Mr. KINNEY:

Q. What was it Mrs. Danford said before Keala went out?
A. She asked what the trouble was with grandmother. Keala went out to find out.
Q. After that what happened?
A. She came back——
Q. (Int.) Never mind that; she spoke?
A. Yes.
Q. And after she spoke, what become of Mrs. Danford?
A. Went out of the room.
Q. Was the proposition of your going home or not given up after that—by Mrs. Danford after the happening that you testified to?

Mr. STANLEY: There is no proposition testified to, as I understand it, about her going home, by Mrs. Danford. I object to the question as leading.

(End of Page 169 Official Transcript.)

322 The COURT: Objection sustained. Witness has not testified to going home as a result of what Mrs. Danford said.

Mr. KINNEY:

Q. Do you know whether or not there was any telephoning.
A. Yes.
Q. When, in connection with the events you have just told us of?
A. It was afterwards.
Q. Who was telephoning?
A. Mrs. Danford and my father.
Q. Was Mrs. Danford at the telephone?
A. Yes.
Q. Did you hear what she was saying?
A. Yes.
Q. What did she say?
A. She said that I was disobeying her orders and that hadn't I better go home?
Q. You didn't hear what the answer was?
A. No.
Q. During the first three weeks of the visit to your grandmother's home, how did your grandfather treat you?
A. Very kindly.
Q. What attention—How did he show it? In what way?

A. He spoke nicely to me; treated me with all the affection he did the others.

Q. What marks of affection did he show.

A. He used to kiss me and be nice to me.

323 Q. Had you shown any affection to him during that time?

A. Returned it in kind.

Q. Any other mark of affection at any time?

A. One I remember distinctly was sitting on his lap.

Q. What happened then, if anything?

A. Mrs. Danford objected.

Q. What did she say?

Mr. DAVIS: I move that be stricken out.

No ruling given.

Mr. KINNEY:

Q. Well, what did she say?

A. She said it was not a ladylike position for me to be in.

(End of Page 170 Official Transcript.)

Q. What happened then?

A. I went away.

Q. Did you ever see any attentions between her and the grandfather?

A. I did.

Q. What did you see?

A. When I came back in company with my cousin, Mrs. Danford was in the position I had left.

Q. Which of you two were the oldest, Mrs. Danford or yourself?

A. Mrs. Danford.

Q. When next did you visit your grandfather?

A. In 1898.

Q. What time in 1898?

A. In April.

Q. How long did you stay that time?

324 A. Seven weeks.

Q. Was Mrs. Danford there?

A. Part of the time.

Q. Was she then married?

A. She was not.

Q. Was it known she was to be married?

A. It was.

Q. What was she doing at the time in April?

A. Preparing for her wedding.

Q. Was there much done or said between you about then?

A. No.

Q. While you were in the house how was it in reference to the ordinary civilities of the day as between you and Mrs. Danford?

A. I don't understand your question.

Q. When in the house, how were your relations with her regarding the ordinary civilities, greetings to each other?

A. We greeted each other.
Q. Both of you?
A. Yes, sir.
Q. When you made your second visit in 1898, where was the home of your parents then?
A. In Kohala.
Q. Did you remain there after 1898?
A. We removed to Honolulu.
Q. At what time?
A. In 1900; in August.
Q. Where have your parents resided since?
A. In Honolulu.
325 Q. In what part of Honolulu did you first live?
A. We lived at Punahou, away on Beretania Street.

(End of Page 171 Official Transcript.)

Q While you were living there did your parents receive any visit from your grandfather?
A. Yes.
Q. When you moved to Honolulu in 1900 where was Mrs. Danford? In August, 1900, she was married by that time?
A. Yes.
Q. Do you know where she was living?
A. I don't remember.
Q. At that time?
A. No.
Q. What time was it that the grandfather visited the home—your home?
A. In December.
Q. Of what year?
A. Of the same year.
Q. Of 1900?
A. Yes.
Q. What do you mean by visited the home?
A. He came down—I have forgotten what the purpose was. But he stayed two or three weeks in the home.
Q. Right in the house?
A. Yes.
Q. At the time where was your uncle Charley and his wife?
A. In Honolulu.
326 Q. In December do you know where Mrs. Danford was then, whether in Honolulu or not?
A. I don't remember.
Q. What other place besides Honolulu did she live in after her marriage?
A. I think in Kauai.
Q. You don't know whether she was there or not at the time?
A. I don't know.
Q. She was in Honolulu when your grandfather came to the place to visit you?
A. I think so.

Q. What happened when your grandfather came to visit to your mother? How did he treat your mother and yourself?
A. Very kindly.
Q. How did it show itself?
A. He took us out riding and made presents to us.
Q. What presents did he make?
A. Dressgoods.
Q. What else?
No answer.
Q. Where did he take you out?

(End of Page 172 Official Transcript.)

A. It was his custom to take a drive every day and he took different ones of the family.
Q. Where did he take you?
A. To the city, out to the Park, to Pacific Heights, and Punchbowl.
Q. What are the presents he gave during that time if you remember?
327 A. I think that was all at that time.
Q. He stayed three weeks?
A. Yes.
Q. How much of the time did he spend in the home?
A. He was home nearly all the time.
Q. At your home?
A. Yes.
Q. How was his attitude towards you and your mother?
A. Very kindly indeed.
Q. Do you remember Christmas time; where you had spent your Christmas?
A. At home.
Q. Who was there at Christmas?
A. Uncle Charley Notley and his wife; Uncle David Notley and his little girl; and grandfather and mother and the three children and myself.
Q. What was the treatment of Charles Notley—that was in December, Christmas of 1900—What was the treatment of Charles Notley by his father then?
A. Very friendly indeed.
Q. How often did Charles Notley visit at the house during that three weeks?
A. Very often. He would stay an hour or an hour and a half at a time.
Q. How much of that time would be spent with his father?
A. All the time.
Q. Do you know whether prior to that Christmas his father had been speaking to Charles Notley or not?
A. I don't know.

(End of Page 173 Official Transcript.)

328 Q. After that three weeks where did your grandfather go?
A. He went home to Paauilo.
Q. Did he return at any time thereafter? Did he come back again?
A. He came back in April.
Q. Where did he stop when he came in April?
A. With us.
Q. You mean by "us" your mother?
A. Yes.
Q. How long did he remain that time?
A. About three weeks.
Q. What day of the week did he arrive?
A. Saturday.
Q. What day did he get out of the house?
A. I don't remember.
Q. With whom did he spend Sunday?
A. With us, with my mother.
Q. Did he give any presents to any member of the family then?
A. Yes; a bicycle apiece for the children, including myself.
Q. What kind of bicycle?
A. Cleveland.
Q. Anything else at that time?
A. That is all that I remember.
Q. What day did he give this to you?
A. To the boys on Monday and the girls on Wednesday.
Q. Did he ever give anything after that?
A. No.
329 Q. Where was Mrs. Danford then?
A. In Honolulu.
Q. Do you remember whether or not she had been in Honolulu at the prior visit when he came down for the three weeks?
No answer.
Q. When did she come to Honolulu?
A. Just before his visit in April that I know of.
Q. How long had she been in town?
A. I don't know.
Q. A long or a short time before he came back?
A. I could not tell you for sure.
Q. Did you see her when your grandfather was stopping with you three weeks?
A. Yes.
Q. You saw Mrs Danford?
A. Yes. You mean in April?

(End of Page 174 Official Transcript.)

Q. No; the Christmas time before that?
A. No.
Q. Did you see your grandfather with her at all?
A. No.
Q. What happened this Wednesday when you say that he gave these Cleveland bicycles?

A. He was not much at home. He would go away in the morning and may be not be back until ten o'clock at night.

Q. How did you know Mrs. Danford was in town that April visit?

A. I have seen her passing on the street.

330 Q. With him?

A. I have seen her alone.

Q. How often did you see her while your uncle was there on the April visit?

A. My grandfather, do you mean?

Q. Yes.

A. I don't remember.

Q. How long did your uncle stay in April—I mean your grandfather?

A. About three weeks.

Q. Well, did he continue to stay only as you say a short time, he would stay in the house?

A. Yes.

The COURT:

Q. He slept, however, at your home at night?

A. He did.

Mr. KINNEY:

Q. How long at a time during the day would he stay?

A. He would go in the morning and would come back to luncheon—may be not. If he came back he would stay a while and then go off and stay may be an hour.

Q. How did that compare with his visit; the first three weeks visit as to the time he spent in the house?

A. There was a great difference. In December he was home a great part of the time. In April he was home very seldom.

Q. What was his manner on the last visit in April as compared with his manner on the first visit?

A. In April he was indifferent and in December he was very particular.

331 Q. How did he show in his indifference?

(End of Page 175 Official Transcript.)

A. He was cool in his manner towards the family.

Q. He still stopped there?

A. Still living there.

Q. Were there any drives during that last visit?

A. There were not.

Q. Are you sure of that?

A. I am sure of it.

Q. No drives at all?

A. None whatever.

Q. How often were those drives on the first visit?

A. Every day.

Q. When did your grandfather come down to Honolulu again after the April visit of 1891?

A. I remember the month, but I am not certain of the year. It was in October.

Q. Was it before or after this visit you have spoken of.

A. After.

Q. Where did he stop on that occasion?

A. At Mrs. Danford's.

Q. Did he call at your home?

A. Yes.

Q. Staying how long?

A. Ten or 15 minutes at a time.

Q. Did you see him on the street at any time during that visit?

A. Yes.

332 Q. How often did you see him on the street?

A. Frequently; in Mrs. Danford's company.

Q. What were they doing?

A. Talking.

Q. On foot or how?

A. Driving.

Q. In what part of the city did you see them?

A. Passing along in front of the house.

Q. What house?

A. We moved from Punahou towards the city on Beretania street.

Q. Opposite what?

A. The German Lutheran Church.

Q. Where was it that he made the first calls upon your family in the October visit?

A. At our home in the lower part of Beretania street, the new home.

Q. Who was with him when he passed?

A. Mrs. Danford.

Q. Did he recognize any of the members of your family as he passed by?

A. He didn't.

(End of Page 176 Official Transcript.)

Q. Did he look in?

A. No.

Q. Did Mrs. Danford look in?

A. Yes.

Q. Did she bow?

A. No.

333 Q. Can you remember who may have been on the front veranda where they could be seen from the street on those visits?

A. My father, mother, Uncle David and the two Notley girls.

Q. Have you known him to pass by your home at other times alone?

A. Yes.

Q. What would he do on such occasions?
A. He would look in and recognize us.
Q. In what way?
A. Wave his hand or bow.
Q. Are you sure that at any time in the October visit when he looked into your home that he was in the presence of Mrs. Danford?

Mr. DAVIS: It is clearly leading.
The COURT: The objection sustained. She has already testified to that.

Mr. KINNEY:

Q. That on no occasion did he recognize the members of his family?
A. I am sure of that.
Q. How far is your veranda from the street?
A. The house is set back a ways, but the front yard is clear.
Q. Open?
A. Yes.
Q. How far is the house from the street?
A. I could not tell you.
Q. Indicate it. Point it out.
334 A. It is set well back in the yard. It is plainly seen.
Q. Well, about how far?
No answer.
Q. Step out here till you see something.

The COURT:

Q. Was it as far as to the roof back of the office?
A. About that from here.

(End of Page 177 Official Transcript.)

Q. The time you speak of now is when you lived on Beretania street between Punchbowl and the German Lutheran Church?
A. Yes sir.

Mr. KINNEY:

Q. On this occasion that you refer to when Mr. Notley and Mrs. Danford passed by, where was his daughter, your mother?
A. On one occasion in the yard.
Q. Standing in the front yard?
A. Near the gate.

Mr. STANLEY:

Q. Were you with her?
A. I was on the veranda.

Mr. KINNEY:

Q. On other occasions where was she?
A. On the veranda.
Q. Where was your uncle David?

A. He was there on one occasion only on the veranda.

Q. At this time in October when he was passing by and not looking in was he calling at the house.

A. He was.

Q. When, in reference to this drive?

335 A. Sometimes in the morning he would call, and in the afternoon he would pass and never look in.

Q. Was there any time in October when he passed and didn't look in when alone?

A. No.

Q. How was his manner when he came to the house? Did he refer to any of these things?

A. Never.

Q. Did you or your mother refer to them?

A. No.

Q. Nothing was said?

A. No.

Q. How did he act towards the family?

A. Seemed to be in a hurry. He only seemed to ask just after the health of the family and the weather and he would say he must be gone.

Q. Do you know how long a visit he made in October?

A. I don't know.

Q. Can you give us any idea of the number of times this happened; that is the old gentleman passing with Mrs. Danford and not looking in?

(End of Page 178 Official Transcript.)

A. Nearly every time he passes.

Q. Was it a week or a month or two or three weeks, what is your best recollection of that?

A. A month I think.

Q. Is there any musical instrument in your home?

A. An organ.

Q. Who gave that?

A. My grandfather.

336 Q. When?

A. On the Christmas visit.

Q. Was there any photograph of your grandfather in the house?

A. Yes.

Q. What kind.

A. An enlarged photo of himself, that came at the same time from himself.

Q. What time if any—had Charles Notley been out to see his father before that Christmas in 1900? Had Charles been to the house to call on his father before that Christmas day?

A. Yes.

Q. At the Christmas dinner did you hear any talk?

A. Yes; grandfather remarked that it was the first time they had been together since the children had gotten married.

Q. Who was not present at the dinner.

A. Uncle William and my grandmother.
Q. Where was Mrs. Charles Notley on the Christmas day?
A. Uncle Charley's wife?
Q. Yes.
A. She was there at the dinner.
Q. Were there any toasts drunk?
A. I cannot tell you.
Q. What carriage was he driving in October?
A. I don't know about the carriage; I know they were his horses.
Q. Old horses that he had before?
337 A. No; a new span of horses that he bought; they were his own.
Q. Did he ever take his daughter out behind that new span?
A. He never did.
Q. Or any member of the family?
A. No.

(End of Page 179 Official Transcript.)

The COURT:

Q. Let me ask you, Miss Hughes: During the December or April visit did Mrs. Danford visit the grandfather at your house?
A. She didn't.
Q. Never came to the house on any occasion?
A. No.
Q. And never came in October?
A. No.

Mr. KINNEY: Did you or she ever recognize each other at any time? From the time you lived in Honolulu until your grandfather's last illness?
A. No.
Q. You would see each other on the street?
A. Yes.
Q. And you would not recognize her or she you?
A. No.

The COURT:

Q. Mrs. Danford may or may not have been in Honolulu in December?
A. I don't know of my own knowledge.

Mr. KINNEY:

Q. You didn't see her during the three weeks.
A. No.

338 Mr. STANLEY:

Q. You didn't know where Mrs. Danford lived at that time?
A. No.

Mr. KINNEY:

Q. After the April visit of the old gentleman to your home you say Mrs. Danford was in Honolulu?
A. Yes.

Q. Where did she live after that?
A. In Honolulu.
Q. Where is she now?
A. In Honolulu.
Q. Where has she been since that April of 1900?
A. In Honolulu.
Q. And your home has been in Honolulu?
A. Yes.
Q. So you both lived in the same town from April, 1900, to this time?
A. Yes.
Q. And at no time during that time has she recognized you or you her on the street?
A. Only after grandfather's death.
Mr. KINNEY: I mean April 1901 when I say 1900.

Page 180 Official Transcript.

Cross examination.

Mr. STANLEY:

Q. Where was Mrs. Danford living in 1901 in April?
A. She came from Kauai; I don't know where she was living.

(End of Page 180 Official Transcript.)

339 Q. You don't know whether she lived in Honolulu?
A. No.

The COURT:

Q. You don't know if she lived in Honolulu?
A. I know that she came from Kauai to Honolulu, but where she was staying I don't know.
Mr. STANLEY: In April, 1901, where in the city of Honolulu did you live?
A. Punahou.
Q. And when did you move to the house opposite the German Lutheran Church?
A. In October, 1901.
Q. You say that you saw Mrs. Danford in April, 1901, with your uncle?
No answer.
Q. With your grandfather?
A. No.
Q. You didn't.
A. No.
Q. During the April visit that your uncle (grandfather) made in 1901, you didn't see Mrs. Danford?
A. No.
Q. On any occasion?
A. I passed her on the street.

Q. When she came past your house?
No answer.
Q. Then, I understand you, during April, 1901, you never saw her pa ng your house?
A. No.
Q. Either alone or in company with your grandfather?
A. No.
340 Q. So that this testimony as regards Mr. Notley not looking in when he passed by in company with Mrs. Danford does not apply to April, 1901, visit?
A. No.
Q. I understand you it is limited to the October visit, 1901?
A. Yes.
Q. How often would you see Mrs. Danford with Mr. Notley passing your house?
A. Three or four times a week I have seen him.
Q. Riding, driving or walking?
A. Driving.
Q. Ever seen her walking past your house?
A. No.
Q. What hour in the day would you see her?
A. Sometimes in the afternoon; sometimes in the morning.

(End of Page 181 Official Transcript.)

Q. What took place as far as Mrs. Danford was concerned, when she passed your house?
A. I don't understand your question.
Q. What did Mrs. Danford do when she passed your house?
A. Merely glanced and looked away again.
Q. You have seen her do that on every occasion she passed?
A. Yes.
Q. You will swear to that?
A. I will.
Q. What kind of a wagon were they driving?
341 A. That was not a wagon; it was a surrey. The surrey I think had the span; and a hack at other times.
Q. Does that thing then closed in, practically closed?
A. It was not always closed.
Q. A hack is generally closed?
A. Yes.
Q. You are willing to swear every time Mrs. Danford passed your house she looked into the house without recognizing you?
A. No.
Q. Or out of the surrey into the house without recognizing you?
A. Yes.
Q. How often did you see her driving the surrey?
A. Quite often.
Q. Can you give me an idea how often you saw her?
A. Four or five days.
Q. In the surrey?
A. Yes.

Q. How often did you see her in the hack, driving by?
A. About the same number of times.
Q. Altogether, eight or nine times?
A. Yes.
Q. And every time she passed the house she looked into the house and gave you no recognition?
A. Yes.
Q. How was it that you hadn't recognized Mrs. Danford when you passed her on the street before your grandfather's death?
A. On account of the trouble in the family.

(End of Page 182 Official Transcript.)

342 Q. Your feelings were unfriendly to her?
A. Yes.
Q. What are your feelings now to her?
A. The same.
Q. Unfriendly?
A. Yes.
Q. And, I understand you, in answer to Mr. Kinney, you say that before you saw her in 1897 your feelings were unfriendly?
A. They were.
Q. Then you have been unfriendly to Mrs. Danford from the time you first knew or heard of her up to the present time?
A. They have.
Q. Did any one accompany your grandfather in December, 1900, when he came down to Honolulu?
A. Yes.
Q. Who?
A. Johnny.
Q. Anyone else?
A. I don't know.
Q. Did you ever hear?
A. I didn't.
Q. Don't you know, as a matter of fact, Mrs. Danford came down with him from Hamakua?
A. I don't.
Q. Where did Johnny stay during the visit of your grandfather at your house?
A. At my mother's home.
Q. All the time?
A. Yes.
343 Q. You are willing to swear to that?
A. He made a trip to Kauai?
Q. What made you say all the time?
A. The way you framed your question.
Q. I said, where did he stay, and you said, at your mother's house. And you said yes. Did he stay all the time in the house?
A. Yes.
Q. But he didn't stay in the city. I asked you where he was during your grandfather's visit. What did you mean by saying that

he was at your mother's house all the time during your grandfather's visit?

A. The way you framed your question I did not understand it.

Q. Where was Johnny Notley when he was not at your mother's house during the visit?

A. He went to a trip on Kauai; that is all that I know.

(End of Page 183 Official Transcript.)

Q. Without your cousin?

A. Yes.

Q. Don't you know, as a matter of fact, your cousin Johnny accompanied Mrs. Danford to Kauai to spend the Christmas of 1900 with her at Kilauea?

A. I didn't hear that.

Q. You never did?

A. Not until after grandfather's death.

Q. Where did Johnny stay when he came back from Kauai?

A. At our home; my grandfather was still there.

344 Q. Did Johnny stay at your mother's house before he went to Kauai.

A. He did.

Q. And do you mean to say that you never heard till long after your grandfather's death from Johnny that he had gone with Mrs. Danford to Kauai and spent the Christmas at her home in Kilauea?

A. No; I will swear to that positively.

Q. Did you ever hear from your Cousin Johnny as to where he had spent the Christmas?

A. I didn't.

Q. He had his trunk with him, hadn't he?

A. He had no trunk.

Q. Or he took his effects when he went on the visit?

A. I did not see him leave the house.

Q. How do you know he went to Kauai?

A. When he bade me good-bye on the morning he was starting for school, he said he was going on a trip to Kauai.

Q. It was not till long after your uncle's death you knew he took Mrs. Danford to Kauai?

A. Yes.

Q. And when he came back you enquired where he had been?

A. No. The only thing he referred to was his trip to Paalua.

Q. What were Johnny Notley's feelings towards Mrs. Danford?

A. I don't know.

Q. Never discussed them with him?

A. No; never heard him speak of them.

(End of Page 184 Official Transcript.)

345 Q. How did you happen to hear after your grandfather's death that he had been with Mrs. Danford on Kauai?

A. I heard him say so in Mr. Kinney's presence.

Q. Don't you know, as a matter of fact, Mr. Notley expected to spend the Christmas in Kauai?
A. No, sir; I never heard of that.
Q. How was Mr. Notley's health when he came to Honolulu on that occasion?
A. He was not very well.
Q. Is that the reason he stayed in Honolulu?
A. I don't know.
Q. Were you at Mrs. Danford's wedding?
A. I was not.
Q. Was your mother there?
A. She was not.
Q. Was your mother invited?
A. I don't know.
Q. She didn't go?
A. She didn't.
Q. Regarding your visits to Paauilo, you state that Mr. Notley treated you very kindly?
A. Yes.
Q. Singled you out for an especial favor?
A. No.
Q. Did he treat you differently from any one else in the house?
A. No.
Q. Treated all alike?
A. Yes.
346 Q. Who was in the house at the time of the first visit?
A. My uncle Charley's four children, Miss Barnard, Mrs. Danford, my grandfather, grandmother and myself.
Q. Everybody received the same treatment from Mr. Notley?
A. They did.
Q. Where were you stopping on the premises during that visit?
A. In my grandfather's home.
Q. But in what building?
A. In the main building.
Q. Where was Charley Notley and his wife?
A. In the cottage.
Q. Where were the children?
A. The two daughters in the main building.
Q. They were living there at that time?
A. They were.

(End of Page 185 Official Transcript.)

Q. How long had he been there before you made that visit?
A. I don't know.
Q. Where did the other children of Charley Notley live? You said in the cottage?
A. I did.
Q. Where did they take their meals?
A. The two daughters and the oldest son in the main building with the rest of the family.

Q. At any of these times was Mrs. Notley, the old lady, present at the table?

347 A. Do you mean at the main house?

Q. Yes.

A. She was not.

Q. Did she ever take a meal at the table while you were there?

A. Not to my recollection.

Q. Did you make any apparent effort to overcome your unfriendly feelings towards Mrs. Danford?

A. I do.

Q. What at most had you made? How did you try to overcome your unfriendly feelings?

A. I did not show them outwardly may be.

Q. You didn't make any outward signs that you tried to overome those feelings of dislike?

A. I don't know, but I tried to.

Q. Did you ever kiss Mrs. Danford?

A. She kissed me.

Q. Did you ever kiss her?

A. I don't know that you would call it kissing her, for I returned it.

Q. Have you ever kissed her of her own wish?

A. No.

Q. What would you call her?

A. I called her Emma.

Q. What did she call you?

A. Maria.

Q. Called her cousin Emma?

A. No.

Q. How old were you at the time?

A. Fourteen.

Q. How old was Mrs. Danford at that time?

348 A. I don't know.

Q. Do you know how much older than you?

A. I don't know.

(End of Page 186 Official Transcript.)

Q. Will you state a little more fully than you did what it was you heard Mrs. Danford say when speaking at the telephone?

A. I had been ill and Mrs. Danford had remarked that it was too much horseback riding that was the cause of my illness and that I had refused to obey her and stay at home; therefore I had better go home. That is all that I heard her say.

Q. Where were you?

A. On the veranda.

Q. Was that the whole of the conversation on her side?

A. That is all I heard. I then moved away.

Q. How was it you came to be at the telephone?

A. She called me.

Q. When she was at the telephone?

A. She said my father wanted to speak to me.

Q. And she made this complaint about you in your presence over the telephone?

A. Yes, in my presence.

Q. Had she ever complained to you personally about taking too much horseback exercise?

A. No.

Q. Mrs. Danford was taking a kindly supervision over yourself with Charles Notley's young daughters?

A. I suppose so.

Q. You know so, don't you?

349 A. I was there under grandfather and grandmother's care.

Q. Don't you know Mrs. Danford was exercising supervision over yourself and Charles Notley's two daughters?

A. That I don't know.

Q. Didn't she give you orders?

A. She didn't order me around.

Q. Didn't she tell you to do things?

A. No.

Q. Didn't she tell Charles Notley's children to do things?

A. She did.

Q. As a matter of fact, that you, being a girl of fourteen years, resented Mrs. Danford including you as among the children?

A. I suppose.

Q. How old was Miss Keala Notley at that time?

(End of Page 187 Official Transcript.)

A. Thirteen.

Q. How old was Miss Lillie Notley?

A. I don't know.

Q. Is she older or younger?

A. She is younger.

Q. Do you know how much younger than Miss Keala?

A. I could not tell you for sure; I think at the time she was eleven.

Q. Miss Keala was thirteen and Miss Lillie eleven?

A. Yes.

Q. Do you know if they were under Mrs. Danford's supervision?

350 A. Yes.

Q. You say that you resented her, including you among the children. How did you show that resentment?

A. I don't know what you mean?

Q. You say that you resented the fact of her trying to include you among the children, to supervise your conduct as well as theirs. How did you show your resentment? Did you obey her?

A. In a way.

Q. Tell us what you mean by "in a way."

A. Everything she asked me to do that I thought was all right I would do that; if they didn't please me then I wouldn't do them.

Q. Then, as a matter of fact, you disobeyed her?

A. I suppose that is what you would call it.
Q. And this testimony about the telephone amounts to this; that she made a complaint in your presence to your father that you were disobeying her?
A. Yes.
Q. The mere statement of what was actually a fact?
A. She didn't forbid me going horseback riding.
Q. You were ill as a matter of fact?
A. Yes.
Q. And she thought that it was the horseback riding and told your father?
A. That is what she said.
Q. On that first visit how did you go from Hamakua?
A. Horseback.
Q. Who accompanied you?
A. Mrs. Danford, Miss Barnard and Keala.

(End of Page 188 Official Transcript.)

351 Q. Where was Mrs. Danford staying when in Kohala?
A. With Mrs. Kay.
Q. Was she calling on you at the time?
A. She didn't.
Q. Did she have lunch there on any occasion just before you went to Hamakua with her?
A. Not that I remember.
Q. You won't swear she didn't?
A. I don't remember.
Q. You don't know one way or the other?
A. No.
Q. Then your answer, when you say she didn't call on your mother in Kohala is a mistake?
A. I don't remember her calling, and I don't remember whether she stayed to lunch or not.
Q. Then you want to modify your statement that Mrs. Danford didn't call on your mother in Kohala, to say that you don't remember whether she did or not. Is that so?
A. Before that.
Q. Not on the occasion of your visit immediately preceding your visit to Hamakua?
A. I don't understand you.
Q. You say that she didn't lunch at your mother's invitation while on a visit to Kohala at the termination of which she brought you to Hamakura?
No answer.
Q. You have testified Mrs. Danford didn't call on your mother?
A. She didn't go to the house.
352 Q. What do you mean, then? You state positively she didn't go to your mother's house and didn't call on her?
A. Yes.
Q. What do you mean by saying a few minutes ago that you can't remember whether Mrs. Danford lunched at the house or not?

A. She didn't.

Q. You will swear now that Mrs. Danford didn't lunch at your mother's house just prior to bringing you to Hamakua?

A. Yes; I will swear to that.

Q. You stated that Mrs. Danford, then Miss Mullinger, was staying at Mrs. Kay's?

A. Yes.

Q. You mean at Halawa, do you?

A. Yes.

Q. How long did she stay in the district at that time?

A. I think it was a week or ten days.

Q. Will you swear that during that week or ten days that Mrs. Danford didn't lunch at your mother's house?

A. I think it was a week or ten days that Mrs. Danford didn't lunch at your mother's house?

A. Yes.

(End of Page 189 Official Transcript.)

Q. Swear that actually?

A. Yes.

Q. No mistake about it?

A. No.

Q. Will you swear that Mrs. Danford didn't, in company with Miss Emma Barnard,—Josie Barnard—lunch at your mother's house during that visit?

A. Yes.

353 Q. Who went over to Kohala with Mrs. Danford at that time?

A. Miss Barnard and Keala.

Q. Did Mrs. Danford go over or remain at the house at all during that visit?

A. Left Keala at the gate and went on.

Q. That is the only time you are sure Mrs. Danford was at the house?

A. And came and got us.

Q. Going?

A. Coming and going.

Q. Didn't go into the house?

A. No.

Q. You will swear that she didn't call at the house at any time during that visit?

A. No.

Q. Either by herself or in company with Miss Barnard?

Recess here taken at 12 o'clock until 1:30 p. m.

Page 190 Official Transcript.

MONDAY, *January 26th*—1:30 p. m.

Continuation of cross-examination of Miss M. A. HUGHES.

Mr. STANLEY:

Q. Prior to 1897, you didn't know Mrs. Danford, I understand you to say, except by report?

A. Yes.

Q. Leaving out these particular visits that Mrs. Danford made to Kohala at the time she brought you back to Hamakua, will
354 you say that Mrs. Danford didn't call at the house of your mother?

A. Going.

Q. When?

A. What do you say?

Q. Leaving out that particular visit Mrs. Danford made when she brought you back to Hamakua—as a matter of fact, didn't Mrs. Danford bring you on the visit we were discussing before lunch—did Mrs. Danford bring you from Kohala to Hamakua?

(End of Page 190 Official Transcript.)

A. I accompanied her; yes.

Q. Didn't she bring you?

A. I accompanied her.

Q. Didn't she bring you from Kohala to Hamakua?

A. Yes.

Q. Why did you decline to answer the question when I put it to you, and say you accompanied her?

A. Because I was to go with her at my grandfather's request.

Q. What exception did you take to the use of the words "bring you with her"? Why did you object to answering "yes"?

A. Because I didn't understand what you meant at first by "bringing."

Q. But you answered that you accompanied her?

A. Yes.

Q. What was there in the question you didn't understand?

A. I didn't understand what you meant by the word "bringing." I went according to my grandfather's wishes.

355 Q. Is it not a fact that you resent the idea that you were under her charge?

A. Yes.

Q. That is a sore subject with you, that you, as a child of 14 years of age, should be under the supervision of Mrs. Danford?

A. Yes.

Q. Leaving out that visit that Mrs. Danford made to Kohala at that time, after which she brought you to Hamakua, will you say that Mrs. Danford didn't call at your mother's house while you were at Kohala?

A. No.

Q. You won't say that?

A. No.

Q. Did she call at your house?
A. Prior do you mean?
Q. Prior or subsequent.
A. No.
Q. Coming; no what?
A. She did make one visit?
Q. When?
A. She stayed with Mrs. May, and Miss Barnard stayed with Mrs. Hall. She came with mother's invitation to the house. I cannot tell you the year and day.

(End of Page 191 Official Transcript.)

Q. When was that with reference to your accompanying her to Hamakua?
A. No.
Q. You persist in that?
A. Yes.
Q. Was that before or after?
356 A. Before that.
Q. Then you had met her before you accompanied her to Hamakua?
A. Yes.
Q. Why did you say that you hadn't—Why did you say you hadn't met her before that time?

Mr. KINNEY: I object to the counsel assuming what is not the case.

The COURT: Was not the witness's evidence she understood it that way?

Mr. STANLEY: Then, I will ask you this: Did you ever meet Mrs. Danford, when she was Miss Mullinger, before you became acquainted with her?
A. I did. What did you say?
Q. Did you ever meet Mrs. Danford, then Miss Mullinger, before you became acquainted with her? That is the distinction counsel draws.
No answer.
Q. Did you ever meet Mrs. Danford before you became acquainted with her? If so, where?
A. I don't understand what you mean?
Q. You state that on an occasion before this visit of yours to Hamakua you met Mrs. Danford. Where was it?
A. At the time she lunched at the home.
Q. How long before the time she visited Kohala that you accompanied her was it that she lunched at the home?
A. I don't know.

(End of Page 192 Official Transcript.)

357 Q. What year was it you went to Paauilo?
A. 1897.

Q. Have you any idea how long before that?
A. No.
Q. You have no idea when?
A. No.
Q. When she lunched at your mother's house did you become acquainted with her?
A. I don't understand what you mean.
Q. When she lunched at your mother's house did you become acquainted with her?
A. I was introduced to her.
Q. And you became acquainted with her?
A. Yes.
Q. So that when you testified on your direct examination by Mr. Kinney that you first became acquainted with her on your visit to Paauilo in 1897 it was a mistake, was that so?
A. Yes.
Q. You also testified, did you not, that you and Mrs. Danford were not on speaking terms until after your grandfather's death?
A. Yes.
Q. You are sure of that?
A. Speaking terms, did you say?
Q. Are you sure that you were not on speaking terms with Mrs. Danford until after your grandfather's death?
A. No.
Q. No what?
A. I did speak to her in my grandfather's home when I visited her.
358 Q. What did you mean by testifying this morning you and Mrs. Danford didn't acknowledge one another until after your grandfather's death?

Mr. KINNEY: I object to that; I don't think he is stating it correctly.

The COURT: I think if the word "acknowledge" were changed to "speak" counsel's statement would be correct.

Mr. STANLEY:

Q. After you and your mother and the rest of the family moved to Paauilo; didn't you testify that after you and your mother and the rest of the family moved to Honolulu you didn't speak to Mrs. Danford until after your grandfather's death?
A. Yes.

(End of Page 193 Official Transcript.)

Q. That is true?
A. Yes.
Q. It is true that after you moved to Honolulu with the rest of the family that you didn't speak to Mrs. Danford until after your grandfather's death?
A. Yes.
Q. Did Mrs. Danford call at your mother's house in Honolulu before your grandfather's death?
A. Yes.

Q. Did you see her?
A. On one occasion.
Q. Did you speak to her?
A. No.
Q. Did you salute her in any way?
359 A. Not to my recollection.
Q. You are not sure then?
A. I am sure.
Q. Not to your recollection—did you speak to her when you met her?
A. I saw her; I didn't speak to her.
Q. Answer my question. You say that you saw her but didn't speak to her. Where did you see her?
A. Coming up the front steps.
Q. You will swear that you never spoke to her either inside or outside of the house until after your grandfather's death?
A. I will.
Q. How often before your grandfather's death and after you moved to Honolulu did Mrs. Danford call at your mother's house?
A. I don't know.
Q. Did you ever hear?
A. Yes; I heard.
Q. How often? Answer!
No answer.

Mr. KINNEY: I object to that as hearsay.
The COURT: Hearsay evidence is never proper. The objection is sustained.
Mr. STANLEY: I note an exception to your Honor's ruling.
The COURT: Exception allowed.

Mr. STANLEY:

Q. How often did you see her at your mother's house?
360 A. Once or twice.
Q. No more?
A. No more.

(End of Page 194 Official Transcript.)

Q. Now, on this occasion—When were these occasions that you saw her. Can you remember the day of the week?
A. I cannot. I was ill most of the time.
Q. Were you ill at the time you saw her?
A. No.
Q. That doesn't account for your lack of memory? Will you say how it is you can't remember you saw her, you being well at the time?
A. I cannot give you the time and date, nor the day of the week.
Q. How is it you remember so distinctly Mr. Notley giving Charley's children or your own brothers and sisters bicycles on Monday and yourself a bicycle on Wednesday, some years back?
A. It was only a year back.

Q. Can you explain that? You cannot give me the days when you saw Mrs. Danford—Did you ever see her there on a Sunday?
A. No.
Q. Will you swear that you didn't see her there on a Sunday morning?
A. Yes.
Q. What makes you sure?
A. Because I was not at home if she called on Sunday.
361 Q. Where were you?
A. I might have been at church; I am not sure.
Q. Are you at church all day?
A. No.
Q. How do you know she didn't call on Sunday if you didn't see her?
A. I don't know about her calling on Sunday.
Q. You are sure of that?
A. I don't know whether she called on Sunday.
Q. You will swear that you didn't see her on Sunday?
A. I will.
Q. Is it not a fact that you saw her on a Sunday morning in your mother's parlor just before going to church; you came in the room; Mrs. Danford was talking to your mother and you kissed Mrs. Danford?
A. No.

(End of Page 195 Official Transcript.)

Q. You say that you didn't speak to her until after your grandfather's death?
A. Yes.
Q. Where was that?
A. When she called at the house and left some things belonging to grandfather.
Q. Why didn't you speak to her before your grandfather's death when you saw her?
A. Because of family trouble.
Q. Why did you speak to her after your grandfather's death?
A. Because mother asked me to be friendly towards her.
362 Q. How did you show your friendliness towards her?
A. I greeted her in a polite way.
Q. What was that polite way?
A. I kissed her.
Q. Has she done anything since that to make you unfriendly towards her?
A. Yes.
Q. What, since that?
No answer.
Q. What has she done since that that makes you still unfriendly?
A. I don't know.
Q. What did you mean by saying she had done something to you to make you unfriendly still? Swear to it if you don't know what it is.
No answer.

Q. I would like to ask, do you know the nature of an oath.
A. I do.
Q. Knowing the nature of an oath, will you tell me whether she had done something since or previous to your grandfather's death that made you unfriendly towards her?
A. Not to me personally——
Q. (Int.) I am asking you—Will you now finish your answer as to something done since your grandfather's death?
A. That ill feeling towards my grandmother.
Q. Since your grandfather's death?
A. Yes.

363 Q. Will you state how Mrs. Danford has shown any ill feeling towards your grandmother since you kissed her after your grandfather's death?

(End of Page 196 Official Transcript.)

A. She has never had anything to do with us much since grandfather's death; only that one morning.
Q. Since you kissed her?
A. That was the first and the last time.
Q. Then, since you kissed her she has had nothing to do with your grandmother? And that has made you unfriendly?
A. No.
Q. Is that it?
A. No.
Q. What is it then?
No answer.
Q. Can you answer?
A. The only thing I feel is her ill will towards grandmother.
Q. How has she shown that ill will since you kissed her since your grandfather's death?
A. In her actions towards me.
Q. What have been her actions towards you?
A. Cool and distant.
Q. What do you expect? What have been your actions towards her?
No answer.
Q. She has been cool and distant towards your grandmother?
No answer.
The COURT: That is a conclusion for the jury.

364 Mr. STANLEY: How do you know that Mrs. Danford has been cool and distant to your grandmother since you kissed her after your grandfather's death?
A. Not only to grandmother, but to the rest of the family.
Q. Tell me how she has been cool and distant, to you included.
A. Yes; she has taken no notice of us whatever.
Q. Did you take notice of her?
A. No.
Q. Have you called on her at all?
A. No.

Q. You saw Mr. Notley passing by on the street when driving in a hack or surrey without looking in, and Mrs. Danford going out of her way to look in and cut you, is that so?
A. Yes.

(End of Page 197 Official Transcript.)

Q. That in October, 1891, that was her custom and Mr. Notley's custom when they passed your house?
A. Yes.
Q. And that they not only cut you, but your father and mother?
A. Yes.
Q. How often have they cut your father and mother in that way?
A. Every time they passed.
Q. How often have they cut you father and mother?
A. Every time they drove by.
Q. And that is 8 or 9 times, you said this morning?
365 A. Yes.
Q. Your mother and father?
A. Not my father; they have cut him two or three times.
Q. Does your father live in Honolulu?
A. No.
Q. Where?
A. Waimanalo.
Q. How often do you see him?
A. Once a week.
Q. During Mr. Notley's visit in 1891 he cut him three times?
A. Yes.
Q. And he cut him the three Sundays he was in town?
A. Not three Sundays; two Sundays and one week day, I think Saturday.
Q. Will you tell me what week day it was when Mrs. Danford called at the house that you wouldn't speak to her.
A. I don't know.
Q. Did you take note of the week day Mrs. Danford cut him?
A. Yes.
Q. And you don't know either of the week days when Mrs. Danford called at the house and you wouldn't speak to her?
A. Yes.

366 (Page 198 Official Transcript.)

Redirect examination.

Mr. KINNEY:

Q. Did you, while you were at Paauilo, either on the first or the second visit, disobey your grandfather?
A. Never.
Q. Or disobey your grandmother?
A. Never.

(End of Page 198 Official Transcript.)

Q. Was there any instance when your grandmother or grandfather told you you were to obey Mrs. Danford?
A. No.
Q. These calls at the house spoken of with your grandfather, when he was alive, what was his condition at the time?
Q. What do you mean?
Q. Was it in reference to his death? There were some calls by Mrs. Danford at your mother's house?
A. He was ill.
Q. How near was it to his death?
A. He was not able to be up.
Q. It was that time calls were interchanged?
A. Yes.
Q. Did your mother give Mrs. Danford to understand that he was too ill to go out? And she came to the house several times?
A. Yes.
Q. At any time prior did she call at the house?
A. No.
367 Q. Were you ever on the witness stand or in a court of law before?
A. No.

Mr. KINNEY: There is one other question, which is not re-direct, but which slipped my memory at the time, that I would like to ask.
The COURT: I think counsel have a right to know what the question is.

Mr. KINNEY:

Q. Did you on that first visit, when you were three weeks at your grandfather's, take coffee with him in the early morning?

Mr. STANLEY: I don't see that there is any objection to the question of drinking coffee with the old man.

A. Twice.
Q. Did you continue it?
A. No.
Q. Why not?
A. Mrs. Danford said father would rather be alone at his morning meal.
Q. Did he say it or indicate it to you?
A. No.
Q. Did you go to the table again?
A. Not after that.

(End of Page 199 Official Transcript.)

Recross-examination.

Mr. STANLEY:

Q. Have you been refreshing your memory since the noon hour?
A. I have not.

Q. Have you spoken with anyone about this case?
368 A. With my counsel; that is all.
Q. Not with any other members of the family?
A. No.
Q. You are sure of that?
A. Yes.
Q. Where did Mrs. Danford tell you not to drink coffee with your uncle?
A. In Hamakua.
Q. With your grandfather—whereabouts in the house?
A. On the veranda.
Q. Who was present?
A. I was alone.
Q. Anybody but yourself and Mrs. Danford?
A. No.

Mr. KINNEY:

Q. Had anyone seen you drinking coffee with him in the morning?
A. Grandmother.
Mr. STANLEY: Anybody else seen you drinking coffee with your grandfather in the early morning beside your grandmother?
A. I don't know.
Q. But you are sure of your grandmother?
A. Yes.

(End of Page 200 Official Transcript.)

Mr. CHARLES NOTLEY, sworn on behalf of the Contestants, testified as follows:

Mr. KINNEY:

Q. Mr. Notley, what is your age?
A. I will be 42 in April.
Q. And your present residence is where?
369 A. Honolulu.
Q. Passing over the events testified to by Mr. Chillingworth and coming down to the year 1885, do you remember the arrival of Mrs. Danford—Miss Mullinger—at your father's home?
A. I do.
Q. When did she arrive?
A. She arrived in the latter end in the year 1885.
Q. Who were the members of your father's household at that time?
A. Myself and wife and children, mother, my brother David and brother William and his wife.
Q. At the time of your father's arrival in Honolulu, where was your mother?
A. She was in Honolulu.
Q. How was she in Honolulu?
A. She went there to meet father.

Q. Where was Mrs. Hughes on the arrival of your father from England?
A. Also in Honolulu.
Q. Do you remember any difficulty—or how long did you remain in your father's home after Miss Mullinger arrived?
A. Five or six months.
Q. Where did you live then?
A Father told us to leave the house.
Q. Who do you mean by us?
A. I, myself, my wife and children.
Q. What was the occasion of it?
A. For my wife not sewing her dresses.
370 Q. What did your father say on the occasion when he told you to leave?

(End of Page 201 Official Transcript.)

A. He told me that "As your wife would not do any sewing for my niece I think that you ought to do so, and as you didn't do it, you must leave the house."
Q. Do you know where she was at that time?
A. In the parlor.
Q. Where did your father tell you that?
A. In the door of our parlor, going in.
Q. What, if anything, did Miss Mullinger say or do when your father told you to leave the house?
A. She didn't say anything at all, looked at the book like that, and heard everything. We left as soon as we could and went over to the Lindsay's place.
Q. Where was that in reference to your father's home?
A. That is on the other side of the gulch. There is a deep gulch between us.
Q. What were the relations between Miss Mullinger and the old gentleman at the time you had that trouble?
A. Their relations were very affectionate.
Q. How did that affection show itself?
A. By the old gentleman always picking her up, sitting on his lap, and kissing, and a good many things showed the disposition, which the old gentleman never used to do before.
Q. How did he address her?
A. He used to address her, "My niece, my pet," and stroke her that way. (Showing.)
Q. How long did you remain across the gulch?
A. I think about three or four months.
371 Q. Then, where did you go?
A. Came back to the house again.
Q. Why?
A. The plantation then was changed——
Mr. BROWN: (Int.) Let him tell the reason why.

(End of Page 202 Official Transcript.)

A. Father called us back over there and my wife went into cooking.
Q. For whom?
A. For father and Miss Mullinger.
Q. Keeping house?
A. Keeping house.
Q. How long did that last?
A. About two months.
Q. What happened then?
A. Then I left the plantation and went to Honolulu.
Q. What time was it that you went to Honolulu?
A. About May or April, I forget which, of the year 1887.
Q. When did you next go to Hamakua?
A. September that year.
Q. To what part of Hamakua did you go?
A. To Honokaa; to lay out homesteads in Honokaa. I was in the employ of the government as surveyor then.
Q. Did you hold communication with your father upon arrival.
A. I think I went up there one Sunday and called on him and he sent mother down for my children and wife.
Q. How long was that after you had been to Honokaa?
372 A. About a month.
Q. They came up?
A. Yes.
Q. Where did you live then?
A. In the cottage of the family home.
Q. About what time did you get settled in the cottage of the family home?
A. That was about—no—we moved into the main building that time and took the rooms we used to occupy when there before.
Q. What were you doing all this time?
A. Surveying with Mr. Brown.
Q. Jake Brown?
A. Yes.
Q. How long did that work take?
A. That took us, perhaps into 1888.

(End of Page 203 Official Transcript.)

Q. When did you again stay at your—again leave your father's home?
A. We left our father's home again that year in January.
Q. January of 1888.
A. January, 1888.
Q. Where did you go?
A. We went across the gulch again.
Q. How long did you stay?
A. Three or four days.
Q. What happened then?
A. I was called back.

Q. Why did you leave—I mean—how did you come to leave?

373 No answer.

Q. I mean by whose orders?

A. My father's orders.

Q. You heard your wife's statement of the occasion of that trouble, did you not, from the witness stand, is that correct or not?

A. That is correct.

Q. Her entire statement is correct from start to finish?

A. Her entire statement is correct.

Q. Now before that occasion when you moved the second time across the gulch for four days, was there any trouble between your father and mother? That is, not this affair when you went across the gulch, but before that?

A. Yes, my father struck my mother.

Q. Just state briefly what you saw of that?

A. I was standing at the entrance of a little off-house we had adjoining the main building when I heard my father's loud voice calling at my mother and the rattling of plates and knives, and I rushed around the building and got there in time to see him strike mother down and raise his hand again and I held him back and said, "Father, don't strike mother." Then he turned around as if out of his head, like mad, and I held him and he said, "Oh why did I do that? I am like a brute. Why did I strike my poor old wife?"

(End of Page 204 Official Transcript.)

Then I took him away and we walked over to the parlor, on the steps there, and he said, "Charlie, why did I do that?"

Q. What was he doing at the time he talked to you?

A. He was weeping and felt awful sorry.

374 Q. Where was your mother after that?

A. She got up from a fainting fit, had her face washed of the blood, and I got them together again and we talked it over.

Q. I will ask you did you know your father struck your mother before that?

A. I never seen him strike her before that.

Q. When he struck her, where was Miss Mullinger?

A. By the pear tree.

Q. Did she take any part in it, at all?

A. The part she took, was in calling out, "Do drive that black woman out of the yard."

Q. You heard that?

A. Yes, I heard that. That is all.

Q. What date was that?

A. January 27th or 29th of 1888.

Q. What date was it when you had the last trouble, and the trouble——

A. No, that was the last trouble. It was two weeks before the 27th.

Q. When the striking took place?

A. Yes.

Q. When you returned, when you had been put out that time, what quarters did you occupy on the premises?
A. We had the Lightfoot's house.
Q. What had become of the Lightfoots during those four days?
A. They were told to leave the place.
Q. And had they gone?
A. They had gone.
Q. Where did they go to?
A. They went to Ookala, I believe.
375 Q. Who, thereafter, first went to Honolulu, you or your father?

(End of Page 205 Official Transcript.)

A. My father.
Q. Was there anyone went with him?
A. He took Miss Mullinger to Honolulu.
Q. Did he say what the object of his trip was?
A. He told me that he was going to take her back to England.
Q. Where was Miss Mullinger when he told you he was going to take her to England?
A. She was there with us, standing there, close to him.
Q. Was there anything to indicate whether she was going willingly or unwillingly?
A. She sat down and cried.
Q. Did they go to England?
A. Not that time.
Q. What became of Miss Mullinger?
A. She was left in Honolulu.
Q. Where?
A. At the Mist's.
Q. How long after your father went with her to Honolulu did you go there?
A. I think about three or four months afterwards.
Q. With your family or not?
A. I went down first. Yes, I had my family down there.
Q. So that would bring your arrival in Honolulu on what date?
A. That would bring my arrival in Honolulu between May or June.
376 Q. Of what year?
A. Of the same year, 1888.
Q. Did you return again to Paauilo, home, until you returned from Hilo?
No answer.
Q. Did you live again at Paauilo between 1888 and 1895?
A. Yes, I think we went up there to do some more surveying.
Q. Who did?
A. I did.
Q. With your family?
A. With my family.

(End of Page 206 Official Transcript.)

Q. Where did you stop?
A. In the cottage.
Q. How long a trip was that?
A. Not very long, because I went to Kona and came back and brought my family to Honolulu. I picked them up and took them home.
Q. So that you were not on the home that night much of the time?
A. Just about the night.
Q. At the time your father and Miss Mullinger left for Honolulu, as you say, with the idea of going to England, were the relations between Miss Mullinger and your uncle friendly at that time?
A. Not at the time they left the house to go to Honolulu.
377 Q. When you got to Honolulu afterwards, were their relations friendly?
The COURT: You mean father, Mr. Kinney, not uncle?

Mr. KINNEY:

Q. Your father and Miss Mullinger, what were their relations?
A. Quite friendly. Equally as good as they were before.
Q. Where did you live in Honolulu?
A. First at Kakaako, then moved to my mother-in-law's place by the St. Louis College.
Q. And thereafter did you go to Hamakua at all to live at the home?
A. Not until 1895.
Q. Going home from where in 1895?
A. From Hilo.
Q. What time did you get home in 1895?
A. Some time in August.
Q. What did you do then?
A. I went into surveying, I picked up the surveying work.
Q. What survey work did you do?
A. Government surveying work; private work and afterwards government work; then I did surveying on the Kukaiau lands.

(End of Page 207 Official Transcript.)

Q. Why did you survey the Kukaiau lands?
A. Father asked me to do this surveying, to survey.
Q. This survey was used in a suit?
378 A. Yes, the survey was used in a suit and I was paid for it, paid well by my father.
Q. What did he give you for that?
A. $1600.
Q. It was a boundary suit, was it?
A. Yes.
Q. Was that suit won or lost?
A. It won the suit.
Q. Do you know the occasion of your father making a present to his children of a large sum of money?

A. Yes, I remember that, giving each of the children $5,000 a piece.

Q. What was that date?

A. That was in 1897, September of 1897.

Q. Did you receive your portion with the others?

A. Yes, I got my $5,000.

Q. When did you do the surveying?

A. That was in the early part of 1897.

Q. Did your father ask you to do anything more for him in connection with his lands?

A. Yes. Do you mean in the lawsuits?

Q. In rendering him any assistance?

A. Yes. In 1896, about March of 1896 an old agreement between the plantation and mill finished; the contract for twenty years was over and it formed into a corporation.

Q. By the mill you mean what interests?

A. Theo. H. Davies.

Q. And who the planting interests?

A. Notley and Davies. And he came back from Honolulu and asked me if I would not try to get my mother

(End of Page 208 Official Transcript.)

379 to sign to the corporation papers the release of her dower for all of the lands that he had turned into the corporation. I did so. At the time he said——

Q. Just wait one moment: when he asked you to do that, how soon was it that you gave your assent?

No answer.

Q. After he asked you to do it for him, what did you say?

A. I said I would do my best.

Q. And did you do your best?

A. I did my best.

Q. And did she sign?

A. After three days she signed the papers.

Q. Did you have any talk with your father thereafter?

A. Father said, "It is a good thing to do that, of you children." "My children and Theo. H. Davies' children would be just on the same footing, and that you would be all right, there would be no trouble." This was the beginning of asking me to ask mother to sign the papers.

Q. What date was that?

A. That was in April.

Q. Of what year?

A. Of 1896.

Q. What was it he said?

A. He said to me that I was to do that, because it was good for all his children and his, Theo. H. Davies' children were equal and would both get the same results in the mill and in the plantation. I said, "I will try." And I did. I tried my best, and mother signed it after three days.

Q. When were the last Notley and Horner suits tried?
380 A. In 1898.
Q. What time in 1898?
A. In August, 1898.
Q. How soon after that was Miss Mullinger married?
A. She married in October that year.
Q. Do you remember any difficulty about going to the wedding—the women folks?
A. Yes, I remember that.

(End of Page 209 Official Transcript.)

Q. What was it about?
A. It was through an invitation to my sister caused the trouble before the wedding.
Q. She not going?
A. Yes and I was preparing to bring the ferns and getting ready the tent—there was a tent built for the dancing, etc. I went—and then back from Honokaa and she called me down.
Q. Who did?
A. Miss Mullinger did. Just back of the house and she said, "Well, I don't think it is any use going into this. Maria is not coming over." I said, "Why?" She said she had telephoned over she was not coming over. And after we asked her the reason and she telephoned over that she knew Mr. Notley had only one daughter and that the invitation she received was to come to the wedding of their daughter Emma, and she said to me, "It is very funny, I thought that you people always took me in as a sister." I said to her, I never took her in at all as a sister; "you never educated me to love you as a sister."
Q. How was she addressed in the house before that?
A. She was addressed as Emma in the house.
381 Q. How did you address her up to the time of the wedding?
A. I would call her Emma; at times Miss Mullinger.
Q. Did you see any of these invitations yourself?
A. I first wrote out invitations in a small hand for her. I did not see any of those invitations she spoke of.
Q. The invitations you copied, what were they?
A. About the wedding of her niece.
Q. Tell us briefly how this went on?
A. When I said these words, she said, she thought all the time we had been loving her as a sister and I abused her for influencing father.

(End of Page 210 Official Transcript.)

Mr. DAVIS: I object to what the witness said, and move to strike out that part of it relating to the father.
The COURT: What witness has stated about taxing Miss Mullinger for influencing his father may be stricken out.

Mr. KINNEY:

Q. What did she say?
A. I said to her that I had come back from Honokaa and that I

had seen something there I thought was not right. She said she didn't know—I told her there was property in Honolulu bought in her name. I told her that since you have been here father has gone and done that and I don't think it is right, bought property in your name. She said I am not aware of it. I said, "probably you are not aware of it; however," I said, "it is—about father doing an act which is not right towards my mother, and I think you have cast such an influence over him that he has committed this act."

382 She then said, "Well, if that is the way you think of Uncle, I will see that you don't get anything out of this property."

Q. What was said further at that time? I will ask you when there was talk about whether she was a daughter or a niece, did she say anything about whether she was an adopted daughter or not? What did she say about that?

A. She said she had her papers and was adopted.

Q. Had you ever heard of that before?

.A Never heard of that before.

Q. Did she say anything more than she had papers and was adopted?

A. She didn't say anything more about that.

Q. When she said to you, "I will see that you don't get anything further out of this property," what was said further?

A. I stayed there and I said to her, "I don't know who you are."

(End of Page 211 Official Transcript.)

Q. After she made that remark to you?

A. Yes, I said, "I don't know who you are." "Well," she said, "I will see Uncle."

Q. What date was that?

A. That was the day before the wedding.

Q. And the wedding was what day?

A. The 18th I think it is.

Q. Of October?

A. October.

Q. 1898?

A. Yes, 1898.

383 Q. After the wedding, where did Mrs. Danford go to live?

A. She went to Honolulu.

Q. When did you next see her?

A. She came up in February, the following year.

Q. In the meantime, who had taken her place in the home?

A. My daughters, Keala and Lily.

Q. Where had they been going to school?

A. They had been going to school in the Sister's school in Honolulu, and while we were there in Honolulu, father asked me to leave the girls come home and I took them home, as Miss Mullinger was going to get married and be away, they will stop home and take care of the place, and he would see they got a teacher.

Q. What time did they get home from their vacation before the wedding?

A. In the vacation.

Q. When did the vacation begin?
A. In July.
Q. And in the ordinary course of events, when would they have gone back to school?
A. In September.
Q. And they would stay home to the wedding and right along?
A. Yes, right along.

(End of Page 212 Official Transcript.)

Q. What date was Mrs. Danford up again?
A. In February, 1889.
Q. 1889?
A. It was 1899.
384 Q. Upon her arrival did you have any talks with her?
A. Yes.
Q. What was the occasion of that talk?
A. She came to me and said that she thought Miss Barnard would be a nice woman to be in the house and that aunt always liked her before. Whenever she got sick she would send for the doctor, and she didn't see why aunt should feel any way disposed against Miss Barnard, and so thought Miss Barnard should come up to the house.
Q. Had Miss Barnard lived at the house from the time of the wedding until this visit of Mrs. Danford?
A. No, she was not in the house.
Q. Where had she been living?
A. She had been down at the Renton's.
Q. How long after Mrs. Danford arrived did she have this talk with you? That it would be a good thing for Miss Barnard to come into the house?
A. Three or four days.
Q. And she came and had this talk with you?
A. I met her at the walk from the cottage and we stood there and she spoke to me about Miss Barnard, what a nice woman she was.
Q. What did you say there to that?
A. I said, "Well, I don't think I can do that."
Q. What did she want you to do?

Mr. STANLEY: I object to what she said, I object to the question. No ruling.

385 Mr. KINNEY: What was it you said?
A. I said, "I don't think I can do that," that is, I could

(End of Page 213 Official Transcript.)

not speak for Miss Barnard.
Q. To whom?
A. To my mother.
Q. What happened after that—I will ask you first—you say Mrs. Danford had been there three or four days when she made this suggestion to you; had she been staying all those four days at your house?
A. Yes.

Q. And not visited makai at all?
A. I don't know. I had a coffee plantation there.
Q. You had a coffee plantation where?
A. Up there.
Q. Up where?
A. Paauilo.
Q. How many acres?
A. Forty-two acres, growing coffee; 150 acres of land altogether.
Q. Where did you get the money to put in that?
A. That $5,000 I got from father.
Q. What happened next in regard to Miss Barnard?
A. One evening I got back from work, father called me down to the house and he said to me——
Q. (Int.) I will ask you first how long that was after Mrs. Danford had made this suggestion to you about Miss Barnard coming in?
A. Not very long, perhaps a day or two.
Q. And when father sent for you, what then?
386 A. He sent for me and said, "Well, I have been thinking Miss Barnard ought to come back to the house; I don't see why but your mother was always fond of her, whenever she was sick she could send for the doctor and she would make a good companion; but I don't see why she is against her now.
Q. Who do you mean by she?
A. Mother.
Q. Was she against Miss Barnard?
A. Yes, she used to be out against Miss Barnard. I can not understand why she is that way. I said "Father,

(End of Page 214 Official Transcript.)

it is no use asking her to come back here at all; I wouldn't do it." He said "It is good to have her up here. She would entertain the children. I would have Clive and Mrs. Davies coming here and your mother would not be able to entertain them." I said, "Clive Davies and Mrs. Davies would rather see mother than a stranger in the house." Well, he began to get mad and he said he owned the place, he was the boss of the place and he would do just as he pleased. I said, "I don't doubt that, but you must recollect that mother has something to say in the place too." He got furious and said if he could not do as he pleased he would shut up shop and leave.
Q. Why do you say he got furious?
A. He stood up and said in a loud tone, his face all in a rage, "If I can not do just as I please, I had better shut up shop and leave."
Q. What happened then?
A. I told him there, I could not help him; I would not ask mother to get Miss Barnard up to the house; and he said "Well, we had planned with your cousin, that is our plan. If I can not
387 do it, I will shut up shop and leave." I said, "I can not help you," and I walked out.
Q. How did he act towards you next day?
A. Never spoke to me in a civil tone at all; only once he spoke to me again on Saturday.

Q. What did he say to you?

A. He told me that I was to go to the house again that evening to make an apology to some gentlemen and ladies that were coming there that evening and I said I would meet them.

Q. What was this matter about?

A. This was on account of some words spoken that my mother had said and he attributed that I had said it, and I was to make an apology for this statement and I said I

(End of Page 215 Official Transcript.)

would meet them, and he also asked me to bring a Scotchman that I had as a carpenter on the coffee plantation down to the house.

Q. First tell us what it was about, and how did the thing begin?

A. The thing began—on Monday morning I went up to my coffee ranch.

Q. What Monday was that in reference to this time where your father said he would close the house if he could not have his way?

A. In the same week. That was on a Wednesday, and on Monday of the same week I went up to the coffee ranch. I went up there, and the little Scotchman I had there as a carpenter said——

Mr. STANLEY: I object to what the carpenter said.

388 The COURT: The objection is sustained.

Mr. KINNEY:

Q. You say your father called you down; now what day was it that he called you down and said you are to come down tonight and make an apology?

A. That was the Saturday of that week.

Q. Now, between the Wendesday night and the Saturday he spoke to you, had he spoken a word to you?

A. Not a word. He was mad with me.

Q. Was there a meeting there Saturday?

A. Yes, there was a meeting there Saturday.

Q. Did he say anything to you at the meeting?

A. Yes.

Q. After what he said to you at the meeting, did he speak again to you?

A. He never spoke to me again after the meeting.

Q. Nor before the meeting between the Wednesday and the Saturday?

A. Not before. And he asked me to go to the meeting

(End of Page 216 Official Transcript.)

on Saturday. After that he never spoke to me again.

Q. The same way?

A. Yes, the same way.

Q. Was he any madder after the Saturday meeting than the Wednesday meeting?

A. No, he was not madder; he was just as raging on the Saturday evening as on the Wednesday evening.

Q. How soon after that did you leave Paauilo?
A. I left Paauilo—I got to Honolulu the day before the first of April, 1899.
Q. And this will is dated May the 18th, 1899?
A. On the 18th of May, 1899, that will is dated.
389 Q. Between that week or that Saturday, or the events of that week and the time you left, did your father speak to you at all?
A. Not a word.
Q. Did you meet him in Honolulu?
A. I met him in Honolulu that May.
Q. Of 1899?
A. Yes, of 1899.
Q. Where did you meet him?
A. On the corner of Fort and King. He was standing on the corner; he and Charley Baker were talking. I said, "Good morning, father," and he looked straight at me and I said, "How are the children?" "Very well, and what of them?"
Q. Was there anything else said between you?
A. Not a word. I simply knew he was not angry when he spoke to me as I went by; my wife was with me on that occasion.
Q. That was May, 1899?
A. Yes.
Q. When did you meet him again?
The COURT: What time in May, 1899?
A. I forgot whether it was the first part of May, 1899.
Q. Was it the first or the last half of May, 1899?
A. It was the first half of May, 1899.

Mr. KINNEY:

Q. After that date when did you see him again?

(End of Page 217 Official Transcript.)

A. After that I often see him, but wouldn't speak to him. I wouldn't go to him. I saw him once passing Bishop's Bank
390 into the Union Saloon, walking inside. I met father again and had a chat with him. I was with my sister and I asked her to come out for Christmas.
Q. What year was that?
A. That was 1900; the Christmas of 1900.
Q. Then between April of 1899 and Christmas of 1900, your father, you say, never spoke to you? What——
A. Beyond just—Oh, yes; once he spoke to me before that day; it seemed the papers were mislaid of the lawsuit of Kukaiau, and he wanted me to help Mr. Brown find them, and he asked me if I could help him.
Q. Where did he meet you?
A. At the fish market, and he asked me if I could help him.
Q. And did you?
A. I did, but when I went to the court it seemed they had found it. And the next occasion I met him he wanted David.

Q. Where was David then?
A. Down on the coal piles.
Q. Did you tell him where he could find him?
A. Yes, I told him he could find him on the coal piles.
Q. Can you give that date?
A. I went on too fast——
Q. Well, if you cannot remember the date, we will go on; who invited you to the Christmas dinner?
A. My sister; I met him there.
Q. How did he receive you then?
A. He received me very cordially then and kindly.
391 Q. Has he ever spoken cordially to you—when was the last time he spoke cordially to you before that?
A. That was in Paauilo, before the row when Mrs. Danford came up.

(End of Page 218 Official Transcript.)

Q. How long a chat did you have with him that evening?
A. The Christmas?
Q. Yes.
A. We had quite a long chat.
Q. Did you go out there any other time when he was there?
A. I often went in the evening and in the middle of the day. He stayed there about three weeks that trip.
Q. When did you see him again?
A. I do not think I met him again—I must have met him again the time he came down ill.
Q. What time was that?
A. In February, 1902.
Q. That ended in his death?
A. Yes.
Q. How did you come to see him then?
A. Well, he was so sick I heard, and he had a lawsuit in Honolulu H. Smith and Hamakua Plantation.
Q. Was this the lawsuit that he was interested in?
A. Yes, and I was one of the principal witnesses for him.
Q. To get the wisnesses for him?
A. I got the witnesses for him, and then I heard he was too ill to come to court, so I took my daughter Lily out there and met Mrs. Danford there. That was all. Then I did not go there
392 again until my mother came.
Q. When did she come?
A. She came in March.
Q. Then, did you go out there?
A. No; before my mother came down I was again out there once to see him, and he was too ill. He simply sat there in the parlor like that, and he looked at me and held out his hand and said, "Charley, what are you doing?" Then he sat down and I looked at him and looked at his feet, and he shoved his foot out and said, "Do you see this foot? It is swollen." And I said, "How is your heart?" And he said, "I am all right now."

(End of Page 219 Official Transcript.)

Q. What date did he die?
A. May the second; this was in March.
Q. When did you go there again?
A. I went out again with mother.
Q. She arrived from Hamakua?
A. Yes, and I went out with her.
Q. What date was that?
A. That was the 28th or 29th of March.
Q. And after she came out, how frequently did you go out?
A. I frequently went out there, taking her some poi and what she needed of food.
Q. Hawaiian food?
A. Yes, Hawaiian food.
Q. Did you see your father then or not?
A. Yes, I saw him then, but he didn't have much to say.
Q. Was he pretty sick?
393 A. Pretty sick man. When I first took mother out there we had been told not to take her out within ten days after she arrived.
Q. Who told you that?
A. I was given notice of it by my sister's little boy.
Q. Mrs. Hughes's little boy?

Mr. STANLEY: I ask that that be stricken from the record and the jury instructed to disregard the last stanza.

The COURT: It may be stricken out and the jury instructed to disregard the statement not to bring Mrs. Notley out for ten days.

Mr. KINNEY:

Q. Did you occasionally see your father for any length of time?
A. Well, sometimes when he had come in from a drive—and finally I was kept away from the place. There were measles in my family. I was told not to come in.

(End of Page 220 Official Transcript.)

Q. When did you next go there?
A. When they sent for me—Oh, about a week before he died I went there almost every day, taking poi to my mother.
Q. But not to see him?
A. I saw him out by the gate Friday that was, he simply collapsed.
Q. Did you see him on that Friday?
A. On Friday he collapsed, and I was notified of it and went out. That was the Friday before he died.
Q. That was one week before his death?
A. Friday.
394 Q. Did you see him or have a talk with him that Friday?
A. When I went there he was sitting on the veranda. I raised my hat and went right to the back to meet my mother, coming right out of the yard, and after I had got home I was told that he

was very bad. When I got home there was a message there to go right out, and I went out there and my father was in a chair, unconscious like and stooping down, and he looked up and said, "Hello, Charley," and went down that way. (Showing.) So we got Dr. Hoffmann in. My mother wanted Dr. Hoffmann.

Q. Did Dr. Hoffmann have charge till his death?

A. Dr. Hoffmann had charge of father until he died.

Q. How often did you see him after that?

A. We were there pretty nearly all the time.

Q. Staying there night and day?

A. Not night and day; just ride over to see how he was getting along, and ask the nurse then to go to him.

Q. Were you there at his death?

A. Yes, I was there at his death; he died in my arms.

Q. Who else was present?

A. At his death? My mother was present at his death.

Q. Did he say anything to her?

A. The last words he said to her, sitting this way, he

(End of Page 221 Official Transcript.)

lifted his legs out and pushed her, "Mele, Mele."

Q. Mele was her name, was it?

A. Mele is my mother's name.

Q. Who was there besides yourself?

A. Myself, my daughter Lily, my brother David and my sister Maria.

395 Q. Mr. Notley, do you remember when Mrs. Danford was installed as mistress of the home?

A. Yes.

Q. What year was it?

No answer.

Q. Did your father have a trip home to England to Miss Mullinger's?

A. Yes. I remember, but I have forgotten the year exactly—it was 1892.

Q. How did you know that she had been made mistress of the house?

No answer.

Q. Who told you?

A. Father told me.

Q. Who was present when he told you?

A. My mother and Mrs. Danford.

Q. What did he say?

A. He said that he was going to install Mrs. Danford as mistress of the house, and mother stayed there, and I told mother you are—(speaking in Hawaiian) (then in English) "A white lady is to be in as mistress."

Q. What did she say?

No answer.

The COURT: State what it is.

Mr. BROWN: Your honor, that means the lord of the house.

Mr Hitchcock is here called to interpret the Hawaiian word.

The COURT: Will you state what you said to your mother in the Hawaiian language?

(End of Page 222 Official Transcript.)

396 Witness speaks in Hawaiian.

INTERPRETER: The woman has been chosen the head of the house, I understand it.

The WITNESS: The lady, the white lady has been chosen the head of the house.

Mr. KINNEY:

Q. What did your mother say?
A. She said, "Pela, is that so?"
Q. What did she say further?
A. She didn't say anything further, but went away.
Q. Where were you and David when David returned from San Mateo?
A. I was in Honolulu.
Q. What did David do after he came from San Mateo?
A. He lived with me.
Q. Did you try to get him work?
A. Yes, I did. I went around to the business houses there.
Q. What business houses?
A. E. O. Hall; Castle & Cooke; Theo. H. Davies, first; and Brewer & Co.
Q. Could you get him any position?
A. I could not get him any position at all.
Q. How soon did he get work on the dock after his return?
A. About three months.
Q. Did your father render any assistance in trying to get him a position in these houses?
A. Not at all.

Q. Have you any personal knowledge of what David
397 done there—or of any trouble between the old gentleman and David?

A. I have no personal knowledge of what there was between them.

The COURT:

Q. Do you know of your own knowledge whether or not David requested your father to aid him in his search for employment?

(End of Page 223 Official Transcript.)

A. No, I have no knowledge of his asking father to aid him in his search for employment.

Mr. KINNEY:

Q. When he returned, where were you living?
A. Up to my mother-in-law's place and back of the St. Louis College, Kamakela.

Q. Was there to your knowledge, any insanity in your mother's family?
A. No.
Q. Did you know many of her relatives?
A. I knew a good many of them.
Q. Her father and mother?
A. Yes, her father and mother.
Q. And other relatives?
A. Yes, I knew the Parkers.
Q. You have never heard of insanity in the family?
A. I have never known of that at all.
Q. Were you in court here in Hilo when Mrs. Danford gave her evidence in the lower court in this trial?
A. Yes, I was here.
398 Q. Do you remember what evidence she gave in regard to the possession of articles of adoption?
A. Yes.
Q. Wherein your father adopted her as his daughter?
A. Yes.
Q. What did she testify about it?
A. She testified that in England they went to a hotel in London and there he gave her papers of adoption.
Q. In a hotel in London?
A. In a hotel in London. And she took it and put it in her trunk, and that is the last time she looked at it until she told us of it in court.
Q. Did she say whether or not she mentioned these articles of adoption as soon as they were signed in London?
A. Only once.
Q. When was that?
A. When we had that little row before the wedding.

(End of Page 224 Official Transcript.)

Q. Did you remember the evidence she gave at that trial as to any knowledge on her part that your father had made a will?
A. Yes, she replied, I think three or four times, that she didn't know anything at all of a will being made by my father.
Q. She said three or four times she had no knowledge of any will being made?
A. Yes, no knowledge of a will being made.
Q. Did she alter that statement before her evidence closed?
No answer.

399 Mr. BROWN: What is this for—for the purpose of rebuttal, or what?
Mr. KINNEY: As part of my case.
Mr. BROWN: You have the right to read her testimony if you want.
The COURT: This is not a criminal prosecution. He may answer.
A. After the recess and dinner and when Stanley questioned her

she made a statement that her uncle had told her that she was going to have the homestead.

Q. She was going to have the homestead?

A. That she was going to have the homestead, and she said, "Thank you, uncle; I love the dear old place."

Q. Do you remember—reverting to the Saturday night in February, 1899, when your father told you to appear and make an apology to some people, did you have any conversation with Mrs. Danford that Saturday night?

A. Yes.

Q. Or did you hear any statement from her?

A. Yes, I did.

(End of Page 225 Official Transcript.)

Q. Was that before or after this talk with the people?

A. It was after the talk with the people.

Q. What was the statement she made?

A. After the people went out I was walking up and down in front of my father and she came into the room.

Q. Just what was the statement she made?

A. The statement she did make to me was that she'd see
400 Miss Barnard would get something out of this property.

Q. And that was in February, 1899?

A. 1899.

Q. On the 18th —— when the will was signed, do you know where your father was stopping?

A. In Honolulu.

Q. Who was present when Mrs. Danford said to you, "I will see Miss Barnard gets something out of this property?"

A. My father was present.

Q. So he could hear?

A. He could hear perfectly plain. It was a loud voice.

Q. How close were they to each other?

A. Father was sitting here (showing) and she was there right close to the arm chair and she stood there after she made the statement to father, and he said, "Get back, get back!"

Mr. STANLEY: Who did he say it to?

A. He said that to her, "Get back, get back!"

Mr. KINNEY:

Q. What was her manner when she said that to you?

A. She seemed to be worked up like, seems strong—she seems to be more like one, not mad, defiant like.

Q. Thereafter did you take steps in regard to these threats?

A. Yes, I went to Honolulu, and I went to Mr. McClanahan of the firm of Kinney, Ballou & McClanahan.

Q. Did you consult them?

A. I consulted them about these threats made.

(End of Page 226 Official Transcript.)

401 Q. And when the will was to be opened, who appeared?
A. When the will was opened you appeared for mother and the children.
Q. Do you remember the time you came to our office, what date it was?
A. Either July or August of 1898.
Q. Of 1898?
A. Not 1898, but 1899.
Q. Where was your father's funeral held?
A. At Honolulu.
Q. What part of Honolulu?
A. From the Undertaker's parlors.
Q. Where was Mrs. Danford when he died?
A. She was at the home.
Q. Why wasn't the funeral held at her house?
A. She would not have it there.
Q. You don't know the reason though?
A. Only what was told me by my sister.
Q. It was held at the Undertaking Parlors?
A. After my sister told me I went and telephoned to Williams to take the body to the Undertaker's Parlors.

The COURT:

Q. How do you know Mrs. Danford would not have the funeral at your uncle's house?
A. She told my sister, I did not hear. I had just laid my father's head down when my sister came and told me——
Q. Did you have any talk with any other member of the Danford family?
A. I was not present.

402 The COURT: That may be stricken out and the jury instructed to disregard the statement made by the witness that Mrs. Danford refused to have the funeral from her house, as his knowledge is only hearsay.

(End of Page 227 Official Transcript.)

Mr. KINNEY:

Q. Who was present at the time of the death?
A. Mrs. Danford was present at the death. The people in the room were our family, myself, mother, and brother David, my daughter Lily, my sister Maria, Mrs. Danford, Mr. and Mrs. Kitcat, the nurse, Dr. Humphries, Dr. Hoffmann and Mr. Danford.

Cross examination.

Mr. DAVIS:

Q. Did you ever hear Mrs. Danford object to having the funeral from the house?
A. I just said I didn't hear it.

Q. Do you know that Dr. Humphris advised that the funeral be not held from the house?
A. No.
Q. Weren't you informed?
A. No.
Q. The reason, you don't know of your own knowledge?
A. The reason?
Q. Yes. Why the funeral was not held, of your own knowledge you don't know?
A. Of my own knowledge I don't know the reason why the funeral was not held. I answered that.
Q. No, you didn't say it before.
A. I said I don't know the reason.
403 Q. Your father gave you $5,000?
A. Yes, he gave me $5,000.
Q. On the 10th of September?
A. 1897.
Q. You say that you put it in these coffee lands?
A. Yes, sir.
Q. Your father was giving you money right along?
A. Yes.
Q. He gave you money freely, never refused you when you asked him for it?
A. No, he never refused me.

(End of Page 228 Official Transcript.)

Q. It is a fact that your father paid $7,000 for you when you got into trouble in Hilo?

Mr. KINNEY: Witness is not considered to furnish evidence on that matter himself.

The COURT: It is improper cross examination. It might be proper on direct to call this witness as your own witness.

Mr. DAVIS:

Q. Did you get into trouble in the Custom House in Hilo?

Mr. KINNEY: I object to that. My objection is that he is privileged, that he has the right to refuse to answer.

The COURT: If that is the only ground of your objection, Mr. Kinney, I do not think it is tenable. With that stated as the only ground of objection, I will advise the witness as to his privilege and the time to exercise it. I do not think the ground will be
404 sustained. The objection will be overruled, but I propose to instruct the witness with reference to answering or refusing to answer a question which would have a tendency to incriminate him.

Mr. DAVIS:

Q. Did you have trouble in Hilo in the Custom House?

The COURT: Mr. Notley, it is your privilege if a question is propounded to you, an answer to which would have a tendency to

charge or convict you with the commission of a crime, you are at liberty to refuse to answer.

Mr. KINNEY: I claim the right as his counsel to advise him not to answer.

Mr. DAVIS:

Q. Did you get into trouble with reference to the Custom House in Hilo? Did you have any trouble, Mr. Notley?

(End of Page 229 Official Transcript.)

Mr. KINNEY: I advise the witness not to answer.

Mr. DAVIS:

Q. In addition to this $5,000 did your father at any time give you $7,000?

The COURT: Do you withdraw the other question?

Mr. DAVIS: Yes.

Mr. KINNEY: I submit that is in the same line of examination.

The COURT: I have told him what his rights are.

Mr. KINNEY: I advise him not to answer.

Mr. DAVIS: I ask for your Honor's ruling. Did your
405 father give you $7,000 beside the $5,000 you have told us of?

The COURT: I think that is a proper question. There may have been two instances in which he gave him $7,000.

A. Gave it to me?

Mr. DAVIS:

Q. Paid for you on your account?

A. Do you mean he gave me $7,000?

Q. Or paid $7,000?

A. I don't know that he paid $7,000 for me.

Q. How much between $5,000 and $7,000?

A. I don't know that either.

Q. Will you swear he didn't?

A. I will swear he didn't.

Q. Did he pay some money for you besides the $5,000 he gave you, and if so, how much?

Mr. KINNEY: I ask a ruling on the question as to whether he should be compelled to answer.

The COURT: If you change the form of the question;—did he pay other money for you outside of the $5,000?

Mr. DAVIS:

Q. Well, I will put this question, Did your father pay $7,000 or $5,000 or any other sum for you?

Objection by Mr. Kinney.

The COURT: You may not prove on cross examina-

(End of Page 230 Official Transcript.)

tion anything but what has been adduced on direct examination.

406 The objection is overruled.

Mr. KINNEY: I note an exception.

Mr. DAVIS:

Q. And if so, when?

Mr. KINNEY: I object to that.

The COURT: The same ruling.

Mr. KINNEY: I note an exception.

The COURT: Exception allowed.

A. He may have paid, I could not tell you that.

The COURT:

Q. Do you know the amount?

A. Could not tell you the amount.

Mr. DAVIS:

Q. About when, Mr. Notley?

A. I don't know.

Mr. KINNEY: I object to that.

No ruling.

Mr. DAVIS:

Q. You will swear before this jury that you don't know that your father paid a large sum of money?

A. He paid me $5,000 and $1,600 for payment on Kukaiau.

Q. Will you swear that you don't know what sum of money your father paid for you after you had the trouble in the Custom House in Hilo?

Mr. KINNEY: I object to that as breaking down the privilege of the witness and ask for a ruling of the court.

The COURT: Objection overruled.

Mr. KINNEY: I note an exception.

407 The COURT: Exception allowed.

Mr. DAVIS:

Q. Will you swear that you don't know that your father paid a large sum of money, between $5,000 and $7,000 for you after you left the Custom House in Hilo?

A. I don't now.

(End of Page 231 Official Transcript.)

Q. You will swear to that, that you don't know?

A. I will swear to that, that I don't know.

Q. You were there at the time—about the time Mrs. Danford was getting married?

A. I was there.

Q. When was that?

A. That was in October.

Q. What year?
A. 1898.
Q. You were there at the house?
A. I was.
Q. Living there at that time?
A. Yes, living there.
Q. And you were fixing up the pavilion where the dancing was, going to take place?
A. Yes.
Q. Who asked you to do that?
A. Father asked me.
Q. You were on good terms with Emma, as you called her, at the time?
A. Yes, I was on good terms and I had to.
Q. Didn't you do it freely?
A. I had to.
408 Q. Weren't you willing to do it?
A. Yes.
Q. You were on friendly terms with her?
A. Yes.
Q. You knew your daughter was going to be her bridesmaid?
A. Yes.
Q. And you spoke to this young lady at the time that you didn't know who she was?
A. Yes, that is right.
Q. That is when you found that the invitations had been sent out to the marriage of his daughter?
A. That is after she told me of the invitations. I did not know anything about the invitations.
Q. That made you mad, the invitations being sent out? Why did you say to the girl I don't know who you are?
A. When she persistently said she thought we knew she was coming out here to be a sister of ours.
Q. Hadn't you got letters from your father that he had adopted her?
A. Not a word.

(End of Page 232 Official Tran[illegible]pt.)

Q. Did you know it at the time?
A. Not before she told me of it that same evening.
Q. Did she tell you before you said, "I don't know who you are?"
A. That was that evening.
Q. Why did you say, "I don't know who you are?"
A. I was mad, certainly. We were both in high words.
409 Q. There was no person present during this conversation, there was no other living witness except your father and Mrs. Danford present when you say that she stated, "I will see that Miss Barnard gets some of this property?"
A. There was no other except ourselves.

Q. And your father? You two, simply you and Mrs. Danford present?
A. That is correct.
Q. Was there anything said about property before that?
A. Nothing at all.
Q. Not a word?
A. Not a word.
Q. Your father wanted Miss Barnard to come to the house? She was uring that with you?
A. Yes.
Q. Your mother did not want her?
A. Yes.
Q. And Mrs. Danford voluntarily said she would see Miss Barnard got some of the property, the property was not being discussed, will you swear to that?
A. Yes, I will swear to that. But you are not getting all the information out.
Q. Your father was living at the time and in good health, was he not?
A. My father was living.
Q. And was there and in good health at the time?
A. He was in good health.
Q. What motive would Mrs. Danford have in saying that
410 she would see Miss Barnard would get something out of his

(End of Page 233 Official Transcript.)

property, what prompted her to say that?
A. You had better ask her. If you will she may give the reason probably.
Q. The reason that exists in your mind?
A. She didn't give any reason, but came down after the parties went out and made that statement right at the time.
Q. Give us the words again?
A. "I will see that Miss Barnard gets something out of this property."
Q. What property?
A. I am giving you the exact words.
Q. What property did she have reference to, do you think?
A. I don't know anything else, but can tell you the exact words.
Q. What property did she mean?
A. She might have meant Mr. Notley's property.
Q. Will you swear she did?
A. I will not swear to that.
Q. And the minute after that—shortly afterwards she made the statement, "You didn't know whose property was meant and you went off consulting a lawyer?"
A. Not a month, a few days after I went to Honolulu.
Q. And the disposition of your father's property was in your mind then? When was that?
A. About five months after.
Q. That was made in February, wasn't it, in 1899?

A. In February, 1899.

411 Q. And a few days afterwards you went to Honolulu?

A. Yes, I went to Honolulu and consulted a lawyer, consulting a lawyer.

Q. You had it in your mind about consulting a lawyer at the time?

A. I had.

Q. Then you were thinking of the disposition of your father's property before he died?

A. I was not.

(End of Page 234 Official Transcript.)

Q. What did you go to the lawyer for?

A. I went to the lawyer in July.

Q. He was not sick then? Didn't you have the disposition of your father's property in mind then?

A. Yes, I had it in mind then.

Q. It was your intention when you left Hamakua to go to the lawyer for that purpose?

A. I went to the lawyer because I had other business to attend to.

Q. But didn't you go about your father's property before he died and you knew he made a will?

A. Yes, before he died, and before he made a will.

Q. Don't you think it was a strange thing for you to be thinking about the disposition of your father's property when he was in good health?

A. Strange?

Q. You were looking ahead, eh?

A. I do not think there was anything strange to go there.

412 Q. Your father never said to you that he was going to disinherit you at the time?

A. In 1896, what did he tell me when I was trying to get my mother to sign off?

Q. At the time he didn't tell you he was going to disinherit you?

A. No, he didn't tell me.

Q. What time was that she made the statement to you that she would see Miss Barnard got something out of this property?

A. That was the Saturday I referred to. That is the month of February about ten o'clock in the evening.

Q. Was there anybody near at hand?

A. There was nobody near at hand.

Q. Where were the other members of the household?

A. Do you want me to explain?

Q. I ask you where were they?

A. They weren't there. They were in the parlor and in the upper cottage.

(End of Page 235 Official Transcript.)

Q. Out of hearing?

A. Yes, out of hearing.

Q. That is the first time you ever heard Mrs. Danford talk about the property?

A. No, that is the second time, the other was before her marriage.

Q. To you alone?

A. To me alone.

Q. Anybody else present?

A. Nobody else present. She said then she would see I would get nothing out of the property.

413 Q. Did you tell anybody about it?

A. I told my attorney.

Q. Anybody else?

A. I told that to Mr. Vredenburg (?) and my family immediately after she said it. I went up to the cottage. That was the man who called me out to see Miss Mullinger then. He was sitting on the veranda. If Hamakua was a still place. I thought he would have heard the words.

Q. But he didn't?

A. I didn't ask him. That was the time I was fixing up the pavilion for her.

Q. Wasn't it you brought up the question of property?

A. I didn't bring up the question of property, but she drove herself up to it.

Q. Didn't you start, and say "I don't know who you are," when she told you her uncle adopted her? Didn't you insult her then?

A. I must have insulted her then.

Q. But the property was in your mind all the time?

A. I had already spoken about that preperty to her in Honolulu.

Q. But she told you she didn't know it?

A. Yes, she said she had no knowledge of that.

Q. Your father bought that porperty as a wedding present to surprise her and that was troubling you?

A. I was mad about it.

(End of Page 236 Official Transcript.)

Q. Wasn't he at liberty to give her a house if he saw fit, a man worth over $400,000?

A. I suppose he was at liberty.

414 Q. Why did that annoy you? There was plenty for you all.

A. There was plenty, but what annoyed me was this, to see that his own daughter was living in a rented house, and not able to give his own daughter a home to live in these many years.

Q. But the girl didn't know it?

A. That is what I felt.

Q. He had given to you freely within four or five years, he had given you over $15,000, will you swear to that now?

A. Well, I know that he gave me $5,000, and another time $1,600 and there were other times when he gave me money.

Q. I am asking you if at that time he didn't give and paid out for you close to $15,000 *for you?*

A. I suppose he had.

Q. Why did you say he didn't give you $15,000 when I put the question to you?

A. I didn't say.

Q. Didn't you say a few minutes ago when I asked you, that he didn't give you $15,000 before?

A. Let a man figure it out a little——

Q. (Int.) Didn't you say that?

A. I said he had given me money.

Q. Didn't you say that he hadn't given you $15,000?

A. He didn't give me $15,000 at a lump.

Q. I ask you if, when you were talking about Mrs. Danford he didn't give you $15,000?

A. Probably he has given me $20,000. I don't think I denied the giving of money. The figure I may.

415 Q. Didn't you say, Mr. Notley, when I asked you the question, that he didn't give you $15,000?

A. I didn't say anything.

(End of Page 237 Official Transcript.)

Q. Didn't you say that I thought I said $20,000?

A. I said he may have given me $20,000.

Q. I said I thought you said between $15,000 and $20,000 and I told you I didn't say $20,000?

A. I said he may have given me $20,000. I don't deny my father giving me money.

Q. Didn't you testify on the last—did you tell this young lady on that occasion that you told her about your father having purchased a house for her? Didn't you say to this young lady, you are not my father's daughter. You may be nothing—you have no claim on him whatever?

A. I may have said that to her.

Q. You were mad when you heard about this house?

A. Bringing the subject up and having just learned of it I was vexed, certainly.

Q. Well, Mrs. Hughes was on the plantation at the time, wasn't she?

A. Mrs. Hughes? Mrs. Hughes was in Kohala.

Q. I mean in Kohala?

A. Yes, on the plantation in Kohala.

Q. Which plantation?

A. I think it is what they call The Kohala Mill Company.

Q. Your father did give to Mrs. Hughes $5,000 in cash at the time?

A. Yes.

416 Q. He didn't give this girl any money; he bought a house?

A. I don't know.

Q. He gave Mrs. Hughes $5,000, didn't he?

A. Yes.

Q. She could have bought a house or anything she liked? It was an absolute gift?

A. Certainly.

Q. Then, if Mrs. Hughes was living in a rented house it was her own choosing?

A. You ask me my reason. I told you that was my reason because——

(End of Page 238 Official Transcript.)

Q. Don't argue with me. He had given Mrs. Hughes $5,000?
A. He had.
Q. She could have purchased a house if she wanted to?
A. Yes.
Q. He didn't give this girl $5,000 at the time?
A. I don't know whether he gave her $5,000 or not.
Q. He gave her a house in lieu of the money?
A. Yes, a house. That was 1898.
Q. When was the $5,000 given?
A. In 1897.
Q. At the time did he give this girl any $5,000?
A. I don't know.
Q. Don't you know as a fact that at the time he gave Mrs. Hughes the $5,000 and you the $5,000 and the rest of you, that he laid aside $5,000 also for this girl which when to buy that property?

417 A. I don't know that.

Q. Will you swear you don't know that?
A. I will swear to that.
Q. He does that—that he had given his daughter $5,000?
A. I don't know if it is a fact or not.
Q. That he gave Mrs. Hughes $5,000?
A. Yes, gave Mrs. Hughes $5,000.
Q. That is what I am asking you now.
A. The girl you said.
Q. Then if she rented a house it was of her own choosing?
A. Rented a house?
Q. How old are you?
A. Will be 42 on the 20th of April, this year.
Q. She is living in a rented house now, though? She got the $5,000?
A. Yes, I know that.
Q. She could have bought a house with the money?
A. Certainly she could.

(End of Page 239 Official Transcript.)

Q. That is all he paid for this girl's house?
A. He paid about $6,000 for the property.
Q. Do you know that?
A. I know that, because it was in the registrar's records.
Q. What registrar's records are you talking about?
A. It was advertised. Don't you see it in the papers?
Q. You answered that your father paid the money and bought the houses?

A. There were other indications.

418 Q. Of your own personal knowledge, did you see your father pay the money? The amount?

A. I did not see my father pay the money.

Q. Your father paid you liberally for the surveying you did for him; paid you all that you asked?

A. He simply paid me as surveyor.

Q. He gave you about $1500 for surveying the land?

A. Yes, and I paid for the witnesses coming down.

Q. He paid you liberally—you were satisfied?

A. Yes, I was satisfied if the paid me $5.

Q. That is a fair remuneration?

A. Yes, that is a very fair remuneration.

Q. You didn't like this girl from the time she came from England—you took a dislike to her?

A. Well, I tried to like her. I tried when she first got to the house, but I noticed right off——

Q. (Int.) I didn't ask you what you noticed. You didn't like her?

A. I tried to like her at the beginning.

Q. Didn't you think it was a small thing for your wife to refuse to do a little sewing for the girl?

A. She had been there about five months then.

Q. Didn't you think it was a small favor to do a little

(End of Page 240 Official Transcript.)

sewing? Didn't you think it was no cause for a serious quarrel, or did you think it was a proper cause for a quarrel?

A. My wife had a right to refuse.

Q. But don't you think it was a small thing to quarrel over when she refused to do a little sewing for this girl?

419 A. Yes, to refuse.

Q. She had taught your children?

A. I heard she had taught one or two days.

Q. Took your children and taught them in the house from day to day?

A. I don't know that for certain.

Q. Have you heard it?

A. Yes, I heard it.

Q. And did what she could?

A. With her own portion, I think.

Q. Do you mean to tell this jury it was only two days that she taught them?

A. I have heard a day or two. You asked me, and I told you what I heard.

Q. No, you added that afterwards.

The COURT: That testimony may be stricken out as hearsay.

Mr. DAVIS:

Q. How many days did she teach them?

A. I don't know.

Q. Who was the person told you?
A. I think the children; they told me that.
Q. Who was it—try and think?
A. I guess the children; they have told me that when I got home from work, sleeping out in the bush. Whether it was there or to my nephew's wedding there I cannot tell, but I heard she got the girls back and wouldn't have Miss Bryant because she was an American girl.
Q. Was your wife there when that was told you? It was in your house, was it?
420 A. I don't know if it was in my house or out in the

(End of Page 241 Official Transcript.)

yard. It was stated that way.
Q. Where was it?
A. At home.
Q. In the house?
A. Certainly.
Q. And your wife was present?
A. I could not swear if she was or was not present.
Q. Will you swear she wasn't?
A. I could not swear that.
Q. Who told you?
A. The children may have told me.
Q. Which child—try and remember?
No answer.
Q. Tell me which one told you.
A. I could not tell you which one told me. I was there from my work.
Q. And will you swear now that whoever did tell you, told you that she taught them for one or two days?
A. That is to my recollection.
Q. Was there anything else about Scripture lessons?
A. No, I think there was only two Scripture lessons, and they prayed so long the children crawled under the table. I am not sure the children said about lessons.
Q. You don't believe in prayer yourself, do you?

Mr. KINNEY: I submit that is not proper.

Mr. DAVIS:

Q. Your children lived in the main house during the time of being taught by Mrs. Danford?
A. We had them in our own cottage.
Q. But they went to Mrs. Danford's every day?
421 A. I told you I get up early in the morning—I may have been in Hilo still.
Q. Your children went to the main house every day?
A. Yes, went down to the main house, racing around the yard; nobody stopped them.
Q. You had no reason to doubt—when you told this young lady

on the eve of her marriage that your father bought property for her in Honolulu, you didn't think it was right and she said to you,

(End of Page 242 Official Transcript.)

"I am not aware of it,"—you don't doubt the truth of her statement?
A. No, I don't doubt it.
Q. You didn't doubt it at that time?
A. I didn't doubt that she didn't know.

Recess taken until 7 o'clock this evening, the Court admonishing the jury not to speak of the case.

7 P. M.

Jury and parties all present.

Continuation of cross-examination of Mr. CHARLES NOTLEY:

Mr. DAVIS:

Q. You said, Mr. Notley, you were present when your father struck your mother?
A. Yes.
Q. Where did he strike her?
A. Here. (Showing.)
Q. In the back of the neck?
422 A. Right here. (Showing on the neck.)
Q. You heard the witness say on the back of the neck, that is not true?
A. Isn't that the back of the neck?
Q. Which was?
A. Right here. (Showing.)
Q. Kind of on the side of the neck?
A. No, it was back of the neck.
Q. But the witness testifies on the back of the neck.
A. I am testifying it was the back of the neck also.
Q. How far back? Just indicate to the jury again, please.
A. It was this side, anyway, right here. (Showing.)
Q. On the side of the neck?
A. I think that is the back of the neck.

(End of Page 243 Official Transcript.)

Q. It was not directly back?
A. Directly?
Q. Yes.
A. You mean at the—well, I could not measure it from what I saw.
Q. I ask was it at the side or back of the neck?
A. At the back of the neck.
Q. How did she fall?
A. That way, forward. (Showing.)
Q. Did her head hit the ground?
A. Yes.

Q. She fell on her back, didn't she?
A. No, she fell forward.
Q. With her face to the ground?
423 A. Yes, her face to the ground.
Q. Who picked her up?
A. I don't know; I know I took father away.
Q. How long was it that you saw her after she was picked up?
A. It must have been about five or ten minutes.
Q. Where was she then?
A. When I went after her?
Q. When you saw her again.
A. She came to the parlor.
Q. What took place then?
A. I got father and mother together and asked them to be kind to one another, and that stopped it. He asked her forgiveness in Native, and he said he was wrong in striking her.
Q. Who were the persons saw him strike this blow?
A. Well, Mrs. Danford was there.
Q. Who else?
A. Mr. Lightfoot was there.
Q. Who else?
A. I think Mrs. Lightfoot may have seen that also.
Q. The witness yesterday didn't testify she was bleeding. Do you testify she was bleeding? You said something about washing the blood off. You say, "No one washed the blood off?"
A. I said after the blood was washed off she went to

(End of Page 244 Official Transcript.)

the house. Certainly I was there when the blood was issuing out of her nose and mouth.
Q. The witness yesterday didn't testify that.
A. No, but I testify that.
424 Q. There was some trouble at the house about some young ladies, was there, that Saturday night you speak of, February, 1899?
A. Yes, there was.
Q. Somebody had started rumor derogatory to their characters?
A. Yes.
Q. And in consequence of that a man named Mr. Madden came to the house?
A. Yes, to appear for some of the ladies.
Q. Who is Madden?
A. Manager of Kukaiau Mill Plantation.
Q. He confronted you and told you that a statement you made was false?
A. Yes.
Q. Told you you had lied about it?
A. Told me I was the one——
Q. Did he tell you you lied about it?
A. I don't think he did.

Q. Will you swear that he didn't?
A. I say that I think I could swear to that.
Q. Didn't he tell you that you were a liar?
A. Not Mr. Madden.
Q. Who was it did?
A. Frank Greenfield called me a liar, and I jumped up to choke him and the old gentleman stopped me.
Q. Then your father got mad at you in consequence of that?
A. He called me a liar also.
Q. Mrs. Danford had nothing to do with the originating of the story?
425 A. I don't know.

(End of Page 245 Official Transcript.)

Q. Well, did she?
A. I don't think so; I don't know.
Q. She didn't circulate the story?
A. Don't ask me that; I don't know about that. All I know, I was asked to meet these people.
Q. She didn't circulate this story?
A. I don't think so.
Q. After that took place, your father told you, didn't he, that you had traduced the character of one of these girls, and that he wanted you to leave the house?
A. He didn't tell me to leave the house.
Q. Did he tell you you had traduced the character of one of these girls?
A. He didn't say anything of the sort.
Q. Didn't your father tell you you had traduced the character of one of these girls?
A. Never said anything of the sort.
Q. Didn't Madden tell you it was a God damned lie?
A. He did not tell me it was a God damned lie. Had he said that I would have nabbed him in the neck too. I am telling you what was done, and that is all.
Q. What did your father say?
A. My father, he said I was a liar.
Q. Who said?
A. My father said.
Q. Didn't he tell you that you had traduced the character of a friend of his?
A. He didn't say anything of the kind.
Q. He said the whole thing was a lie?
426 No answer.
Q. Did you ever hear Miss Mullinger say anything to your father about the disposition of his property?
A. Me? Heard my father?
Q. Heard Miss Mullinger.
A. I didn't hear.

(End of Page 246 Official Transcript.)

Q. Either when Miss Mullinger, or after she became Mrs. Danford, did you ever hear her ask him about his will or his property?
A. No.
Q. Did Miss Mullinger ever say anything about his property in the presence of anybody besides yourself?
A. In the presence of my father.
Q. Outside of anybody else you can bring here?
A. I don't think so.

Redirect examination.

Mr. KINNEY:

Q. When your father in the presence of other people said you were a liar, did you say anything to him?
A. Yes, I answered him.
Q. I mean did you say anything disrespectful to him at all when he said that?
A. I don't think I said anything.
Q. Why not?
A. Well, because he was my father.
Q. How soon—let me ask you, were those ladies concerned in this matter friends of Mrs. Danford?
A. They were her friends, yes.
427 Q. Had Mrs. Danford been down to where they were stopping about that time?
A. She had been down there and slept there over night.
Q. What night?
A. Thursday night.
Q. And when was it your father said you were to meet this party?
A. Saturday.
Q. This party of people?
A. Yes, this party.
Q. And where was Mrs. Danford—did you see these people come up—when did Mrs. Danford return?
A. I don't know when she returned. She went there Thursday night.
Q. She was up at the house that evening when these people came?

(End of Page 247 Official Transcript.)

A. She was at the house that evening.
Q. How soon after these people left was it she came in and made this remark about Miss Barnard?
A. About five minutes after the other party had gone from the house.
Q. You testified that she was in an excited, defiant frame of mind?
A. Defiant, triumphant style of look.
Q. But she had been in this room when this talk was going on?
A. When I went down she was in the parlor.
Q. How near is that parlor to this room?
428 A. Eighteen or twenty feet.
Q. She was not in the room itself?

A. No, she was not in the room itself.

Q. How was the attitude of your father that evening when these people first came?

A. His attitude was as it was on the Wednesday night—mad. I went there well prepared for this council.

Q. You mean as to these people?

A. Yes, they were all sitting around ready.

Q. When you went in you say he was mad?

A. Yes.

Q. When these remarks were being made: young Greenfield said you were a liar and some one else a God damned liar, as they say, did your father say anything on your behalf?

A. Not a word on my behalf.

Q. Was that like the father you had known in your youth?

A. Ah, no; not the father of my youth.

Q. Did you do any apologizing that night?

A. No, I would not apologize.

Q. Did any of these knight errants that went up there for this purpose, attempt to enforce their views and make you apologize?

A. By using these words.

(End of Page 248 Official Transcript.)

Q. Anything outside of the talk?

A. Nothing outside of the talk?

Q. Why didn't you apologize?

A. Because I didn't make use of that language.

429 Mr. STANLEY: I just want to ask a few questions in connection with it.

Mr. KINNEY: I object to this shifting.

The COURT: This is simply re-cross examination, I understand.

Mr. STANLEY:

Q. You said, didn't you, in answer to Mr. Davis that none of the other parties in the house could have heard what went on this Saturday, February, 1889, because they were in the parlor and other parts of the house?

The COURT: That is not re-cross examination, Mr. Stanley.

Mr. STANLEY:

Q. Mrs. Danford was in the parlor 18 feet away? As a matter of fact, Mr. Notley, you say that you went there well prepared?

A. I didn't say that I went there well prepared.

Q. Didn't you say that you went there well prepared to meet this council and found them all sitting around there?

A. I said when I got there everything was prepared.

Q. You didn't say you went there well prepared to meet this council?

A. No.

Q. And you didn't go there well prepared?

A. I didn't go there well prepared.

Q. You deny saying that you went there well prepared to meet this council?

A. I do deny.

(The reporter reads the question and answer alluded to.)

430 Q. Do you deny now that you said you went there well prepared?

A. Since that is brought out, I don't deny it; I made

(End of Page 249 Official Transcript.)

a mistake.

Q. Now in the face of it, that you have stated and that it is down in black and white, and that you did go there well prepared, which is true?

A. Well, what is in the book?

Q. In one statement you said that you went there well prepared to Mr. Kinney. The statement to me is that you didn't go there well prepared. Which is true?

A. I can say that I was not prepared.

Q. Then the first was a lie?

Mr. KINNEY: I submit that is improper.

Mr. STANLEY:

Q. I want to ask you which statement is true?

A. I was not prepared.

Q. You stated in answer to Mr. Kinney that you would not apologize because you didn't make the statements.

A. That is right.

Q. As a matter of fact, weren't you then and there given an opportunity to admit or deny the truth of the rumor that you had made statements?

A. I was given that opportunity.

Q. Did you make it?

A. I told them I didn't make that statement.

Q. Is it not a fact that you told them that because they went at you so hard, you refused to apologize and wouldn't give satisfaction one way or the other?

431 A. That is a lie.

Q. How long did that interview last?

A. Perhaps an hour.

Q. And the conclusion of it was that your father told you you were a liar?

A. Yes.

(End of Page 250 Official Transcript.)

Mrs. MARIA HUGHES, previously sworn for the contestants, testified as follows:

Mr. KINNEY:

Q. Mrs. Hughes, in what year were you married?

A. In 1881.

Q. Where were you when Mrs. Danford arrived in the Islands?

A. I was in Honolulu.
Q. When the steamer came in where were you?
A. I was at the wharf with my mother to meet them.
Q. To meet them.
A. Yes, to meet them.
Q. Upon meeting them where did you go?
A. Drove to Kakaako to the house father had down there.
Q. Where did you take lunch?
A. I don't think we had lunch; it was dinner.
Q. Where did you take the dinner?
A. We went to the restaurant beside the old Elite.
Q. Who went?
A. Father, mother, Mrs. Danford and myself.
Q. What happened at that meal?
432 A. Mrs. Danford said something to father that I didn't hear.
Q. How was it said?
A. She spoke very low, and father had to lean towards her to hear what she said, as he was a little deaf, and he straightened himself up and said, "Can't you give us a clean table cloth?" to the waiter, and the waiter said, "It was clean this morning." "Well," he said, "if you cannot put a clean table cloth on for us, we'll go somewhere else." With that we rose up and went to the hotel.
Q. Was anything said to you or your mother at the table?
A. Not a word.
Q. Did you two follow after?
A. We got into the hack and drove to the Hawaiian Hotel.

(End of Page 251 Official Transcript.)

Q. Did you have dinner there?
A. Yes, we had dinner there.
Q. Who ordered the dinner?
A. Mrs. Danford. Well, father stopped and asked her what she wanted, and he gave the order to the steward. Mother and I sat at the table.
Q. Who sat alongside your father?
A. Mrs. Danford.
Q. During that meal was any remark addressed by Mrs. Danford to your mother at all?
A. Not a word.
Q. Was there any remark addressed during that meal to you?
A. She merely remarked if I liked celery, and I said no.
433 Outside that conversation she addressed herself to my father.
Q. During the entire meal?
A. During the entire meal.
Q. After the meal was over where did you go?
A. I drove home and father drove down to Kakaako. I was then staying with my mother-in-law.
Q. During that talk, up to the time you drove up to the dinner, how much conversation was there between your father and mother?

A. It was difficult to say how much conversation there was, so many of us talking and we were all so excited on his arrival.

Q. How long did your father and Miss Mullinger remain in Honolulu before they came up to Hamakua?

A. I am not quite sure how long, but I think it was a couple of weeks.

Q. What were the relations between your mother and Mrs. Danford down there—friendly or otherwise?

A. Well, the first day it was friendly, and a day or two afterwards it was not?

Q. How do you know that?

A. Mother came up and told me of it one morning.

Mr. STANLEY: We move that the last answer be stricken out and the jury instructed to disregard it.

(End of Page 252 Official Transcript.)

The COURT: It is so ordered on the ground that it is hearsay.

Mr. KINNEY:

Q. When your father came to Hamakua with Mrs. Dan-
434 ford did your mother return with them?

A. Yes.

Q. When he first visited home—when did you go back to Hamakua?

A. In 1886.

Q. And how long did you remain?

A. Until 1889.

Q. Do you remember any occasion while you were living in Hamakua when your father came to you in regard to Miss Mullinger?

A. Yes.

Q. What was it?

A. Some trouble that happened in the home.

Q. What did he say to you?

Mr. STANLEY: I object, if the Court please, to this. The testator's declaration with regard to his will, the execution of his will or disposition of his property may, and I think should, rule, but certainly the testator's intention with regard to some row in the family cannot rule. It is hearsay, and inadmissible.

The COURT: That is covered by the ruling of Saturday, it is not, Mr. Stanley?

Mr. STANLEY: I don't think so, your Honor.

The COURT: This question does not call for any declaration with reference to the instrument at all. It tends to show in the same measure the relations that existed between the testator and others. The objection is overruled.

435 Mr. STANLEY: I note an exception to your Honor.

Mr. KINNEY:

Q. What did he say to you?

A. He asked me if I had heard of the trouble. I said yes. He

said, "Will you let your cousin come and visit you in your home again?" I said, "No." I then asked him if it was true that she

(End of Page 253 Official Transcript.)

called my mother a black woman, and he said "Yes." I said, "If my mother is a black woman and my brother a black man, I am your daughter and a black woman too, and I wish you not to forget it."

Q. What did he say?

A. He said, "I do not blame you, my daughter, for saying so, for she is your mother and he is your brother."

Q. Did you receive Miss Mullinger at all?

A. Not then.

Q. Did she come down at all after that? Or come in the house and meet you?

A. No, not then.

Mr. STANLEY: If the Court please, I rise to present a motion that the evidence just given of the story of this row be stricken from the record, upon the ground that it would tend to show the feelings, the state of mind of the testator, and we claim there is nothing there showing the feelings or the state of mind of the testator, and ask that it be stricken out.

The COURT: However, the motion to strike out is granted, because it appears here it doesn't show the condition of mind of the testator at all. The testimony is ordered stricken out and the jury instructed absolutely to disregard the testimony.

436 Mr. KINNEY: I note an exception.

The COURT: Exception allowed.

Mr. KINNEY:

Q. I would ask whether or not your father said anything about what he himself had done in the matter?

A. He also told me he had struck mother, something he had never done in his life before, and he was very sorry for it. He always looked upon men who did such things as dirty brutes, and he had brought himself down to that.

(End of Page 254 Official Transcript.)

Mr. STANLEY: I move that be stricken out as hearsay and inadmissible.

The COURT: The motion is granted. This last statement of the witness is ordered stricken from the record and the jury will disregard it absolutely.

Mr. KINNEY: I note an exception.

The COURT: Exception allowed.

Mr. KINNEY:

Q. Do you remember visiting your father's home in 1893?

A. In 1892.

Q. With whom?

A. With my mother and my three children. Maria was then in school in Honolulu.

Q. What time did you arrive in Paauilo with your mother?

A. Somewhere about 11 o'clock at night I think.

Q. Was anything eaten at the table that night?

A. Yes.

437 Q. While your mother was eating at her table where was Miss Mullinger usually?

A. She was there with us also.

Q. Was your father there too?

A. Yes, he was there also.

Q. State what, if anything, occurred at the table there in which Miss Mullinger took part.

A. Mother ate rather ravenously. She was so hungry, having been all day from five in the morning till eleven at night lacking food, and we were seasick—and she remarked, "Why does Aunt eat so?" She looked so disgusted.

Q. Did your mother understand that remark?

A. Yes.

Q. How do you know?

A. From what she said afterwards to me.

Q. Did you ever have any conversation with your father with reference to your brother Charles later?

A. Yes.

Q. When was that?

A. About that same visit in 1892.

(End of Page 255 Official Transcript.)

Q. What was said by your father in regard to his letters?

A. He was speaking of Charles's letters and how proud he always felt of Charles's letters; and he invariably passed them to Miss Mullinger to read, and she used to criticise them.

Q. Did she say in what way?

A. Yes, the language, ungrammatical.

Q. What did he say about it?

438 A. He said she was very smart.

Q. At the time?

A. Yes.

Q. Did you have any conversation with your father with regard to Charley's letters, say the middle of 1899? At any time after that did you have any talk with your father about your brother Charles, or he have any talk with you?

A. In 1890 I think—in 1900.

Q. What month of 1900?

A. In February, when I went over after he got hurt.

Q. Where?

A. He wrenched his back down the office steps. I went over from Kohala.

Q. What did he say to you?

A. I don't know exactly how he started the conversation, but

while talking he said, "I have been thinking strongly of making Charley one of the executors of my will."

Q. Did he say why?

A. No, my baby awoke then at the time, and he never renewed the conversation again about it.

Q. Did he say who were or had been his executors?

A. No, I never knew anything about it beyond what he said then.

Q. Did he at any time thereafter have another talk with you about Charles?

A. Yes, I think it was in April, 1891.

Q. What was the time?

No answer.

(End of Page 256 Official Transcript.)

439 Q. Let me ask when you speak of April, 1901, do you remember any time when your father came down and stayed with you a while?

A. That was in December of 1900.

Q. How long did he stay?

A. Three weeks.

Q. And at that time, that is, when he came down, did you know what his relations with Charles were?

A. Well, from his remark in February I judged that he was quite friendly to Charley.

Q. Do you know whether or not there had been trouble between them?

A. Only from what little mother had been trying to tell me.

Q. Where did you spend Christmas, 1900?

A. I spent it in Honolulu.

Q. Who did you entertain, if anybody at all, on Christmas day?

A. I entertained my father, Charley and his wife, David and his little girl and my little family. My husband could not stay to dinner.

Q. How often did Charles with your father meet in your home?

A. Just as often as Charley was able to come out; Sundays three or four hours.

Q. Did your father know that he was going to be there at Christmas?

A. Yes.

Q. What did he say?

A. He said, "That was nice."

Q. Do you remember any remark he made with reference to Charles coming and visiting him?

440 A. He said it was nice to see him come out there.

Q. Do you remember any remarks he made to you with reference to how you folks have treated him?

A. That was in April.

Q. What did he say then?

(End of Page 257 Official Transcript.)

A. He told me what he was going to tell me, I must not turn my feelings against my brother Charley.

Q. Did he tell you?

A. No; he kept hesitating so. He said, "Oh, I—um—Mr. Walker is going away, and I will have to get another executor." I immediately thought of what he had told me in February. "Did you hear anything, the trouble we had about your brother Charley?" I said, "No, I haven't heard anything. Mother had been trying to tell me something, but I told her I didn't care about these things."

Mr. Stanley: We object.

No ruling.

A. (Cont.) He then stopped and talked of something else, of a journey he was going to take.

Mr. Kinney:

Q. What journey was that?

A. I don't know. He merely told me that he was thinking of going away, and that Cecil Brown had $100,000 in his hands cash. I then said, "Well, father, if mother cannot go with you, take Johnny."

Q. Had he at any time referred to the trip that he intended taking?

A. No, that was the first time I heard of it from father.

Q. Did you ever have any talks with Mrs. Danford about a trip your father had intended taking abroad?

441 A. Yes, in April, 1889.

Q. Of 1889?

A. In 1898, just before she was married we were talking of different things and she mentioned father intending to take a trip, but she didn't know whether he was really going now or not.

Q. Did she say where?

A. She said to New Zealand.

Q. Had you ever heard of a plan of that kind?

A. No, only from her at that time.

Q. Were you present at the death of your father?

A. Yes.

(End of Page 258 Official Transcript.)

Q. Did he say anything in his last moments?

A. He called, Mary.

Q. Who was Mary?

A. My mother.

Q. Where was your mother at the time?

A. She happened to just step out of the room when he called, Mary.

Q. Were you there up to the time of his death?

A. Well, we were there about twenty hours. The doctor sent for us. We stayed until father died.

Q. After his death, did you have any talk with Mrs. Danford?

A. No, it was before his death. She said to me if I didn't think father had better be buried at Hamakua at the church there, he has helped to build? I said I would speak to mother about it. I did so and when I came and told her mother preferred to bury him in

Honolulu. She said, "When he is dead I will have nothing more to do with him."

Q. Where was he buried?

A. In Honolulu.

442 Q. At the house or where?

A. In the cemetery there.

Q. Buried from the house?

A. No, from Mr. Williams' undertaking parlors.

Q. Do you remember the time when Johnny Notley came down to the house?

A. The time he met with grandfather?

Q. Yes.

A. Yes.

Q. Do you know whether or not there was any conversation at the house during his stay there with regard to Mrs. Danford?

A. I heard father telling Johnny in the bedroom that he wanted him to take Emma Danford down to Kauai. After he left father I said, "Johnny, don't you mention Mrs. Danford's name in this house. It always rouses ill feeling. I will not have her talked about."

Q. Was her name mentioned in the house?

(End of Page 259 Official Transcript.)

A. No.

Cross-examination.

Mr. Stanley:

Q. Do you know whether or not your injunction as to Mrs. Danford's name was obeyed? Do you know whether or not your order about Mrs. Danford's name was obeyed?

A. My children always obey me.

Q. Answer my question, please. (Reporter reads question.)

A. Yes.

Q. That was obeyed so well that your daughter Maria never heard that Johnny brought Mrs. Danford to Kauai and stayed at the Danford's house?

443 A. Well, Johnny told, from being forbidden to speak with Emma Danford, he told my children he was going to Kauai with Paalua Hackfeld and he was going to have a good time. That is the excuse he gave my children. I had forbidden him mentioning her name on account of ill feeling. I hadn't forbidden him to tell the truth.

Q. And he obeyed the order by telling something which was false? He didn't say he was going with Mrs. Danford before or afterwards?

A. He didn't tell it.

Q. That explains your daughter never hearing until after your father's death Johnny spent the Christmas with Mrs. Danford at Kalawau (Kilauea?)

A. Probably.

Q. As a matter of fact on the evening that Mr. Notley died, had Mrs. Danford—isn't it true Mrs. Danford suggested the old gentle-

man being buried in Hamakua? Did she say anything in support of the suggestion?

A. She asked me if it wouldn't be a good idea to have father buried in Hamakua at the old church as he helped to build it. I then said I would ask mother about it, who might concur in her suggestion and see it was a nice thing.

(End of Page 260 Official Transcript.)

Q. You thought that yourself?
A. Certainly.
Q. He had lived in Hamakua?
A. Certainly.
Q. For fifty years?
A. In Hamakua fifty years?
Q. When did he come to the country?
A. He lived in Hamakua twenty-seven years.
Q. When did he come to the country?
A. He lived in Waimea.
444 Q. Well, in the Island of Hawaii?
A. Well, I presume fifty years.

Q. He made his home in Hamakua twenty-seven years, made his fortune there and you agreed with her it was a good suggestion he should be buried where his home was?

A. No, I didn't say anything about that.

Q. You say you thought it a nice suggestion?

A. Yes, and I spoke to my mother about it. A. Her objections were that she didn't wish his body to be tossed around, but taken to the cemetery in Honolulu and buried quietly. I went back and said what my mother desired. And she said: "I will have nothing more to do with him after he is dead."

Q. Who are you speaking about?
A. Of my father.
Q. Who were you two speaking of at that time?
A. Of my father.

Q. Did she lay stress on it? You said she said, "I will have nothing more to do with him after he is dead." Did she lay stress on it?

A. No. I laid the stress on it for you.

Q. You have no fault to find with using the personal pronoun "he" instead of saying "my uncle?"

A. Not at all.

Q. As a matter of fact, your mother was the person entitled to his remains?

A. Certainly.

(End of Page 261 Official Transcript.)

Q. And the old lady differed with her on the question as to whether he should be buried in Honolulu or in Hawaii, and she said "I will have nothing further to do with him after he is dead."

A. It didn't sound so very nice.

445 Q. And it sounds worse now, doesn't it, Mrs. Hughes? A great deal depends, Mrs. Hughes, on the tone in which these words are used.

A. That is just according to how you look at it.

Q. You may have been mistaken in finding fault with the language Mrs. Danford used?

A. I found no fault beyond thinking it was rather out of place for her to make that assertion after her speaking to me about the burial of father. I didn't see where the point came in and she said "I will have nothing more to do with him after he is dead." It sounded entirely out of place.

Q. Didn't she imply this matter must be settled by your mother?

A. If she said "Well, if aunt pleases it will be all right?"

Q. You remember distinctly the language used by Mrs. Danford?

A. I do.

Q. How long was that before the old gentleman died?

A. This was Thursday evening she told me this.

Q. It was not the night he died?

A. He died Friday night.

Q. Then she didn't tell you this on the night he died?

A. No it was not on the night he died, it was the night before.

Q. Who was present?

A. Mr. Kitcat was present with us and I spoke of it, I think, at the table.

Q. Do you know that Mr. Kitcat is now on his road to New Zealand?

A. Yes.

(End of Page 262 Official Transcript.)

Q. Is there any person in the Territory who was present?

446 A. When she spoke of burying father?

Q. No, when she answered that.

A. No, Mr. Kitcat didn't hear her say that. I didn't notice if there was anybody close or not.

Q. You have treasured that up in your mind with the old gentleman, your father, lying dying in the house? You had to think of these things?

A. I wouldn't be a daughter if I didn't treasure it up.

Q. You were thinking what expressions of hers you could treasure up?

A. No, I was struggling to forgive her for what she had done to my mother and trying to be as loving as I could for the kindness she bestowed on father.

Q. How long had you been so striving?

A. For the three weeks she took care of father, from the time I went to see him to his death.

Q. Didn't she only take care of him for three weeks?

A. I saw him driving around, I didn't consider she was doing much for him then.

Q. Prior to that you saw him driving around?

A. Yes.

Q. Will you tell me who it was that really bridged the gulf between you and Mrs. Danford? Who made the first overtures?

A. No one. I generally met Mrs. Danford and father coming up Union Street. I had made up my mind in the morning to go and

see father that afternoon, and I saw him there. I walked across the road and she drew up the carriage as I came up to them; she'd have to or she'd have to drive over me, otherwise.

447 Q. She would have to?

A. Well, if she wanted not to be imprisoned for life she would.

(End of Page 263 Official Transcript.)

Q. Well, was it just the fear from imprisonment kept her from doing it?

A. I don't know about that.

Q. Didn't Mrs. Danford tell you when she stopped the carriage not to let any differences between you and yourself interfere with your going to the house?

A. She didn't say it until I told father.

Q. Answer my question, did she say that?

A. Not before I told her I was going to see my father. Father was not living in the public hotel and I could not intrude in that home; therefore I told father I was going to see him and for what.

Q. Didn't she tell you you were not to let any differences between you and yourself interfere with your going to the house to see her?

A. That is what caused her to say it.

The COURT:

Q. Did she say that or didn't she say it?

A. Yes, after I said that to father.

Mr. STANLEY:

Q. How long had you been in Honolulu when Mr. Notley arrived from England with his wife—with his niece?

A. Eight or nine months, I think.

Q. Where were you living?

A. With my mother-in-law.

Q. Where was Mr. Hughes?

A. Sugar boiler in the Plantation in Hamakua.

448 Q. You were just down on a visit to your mother; it was not the business of your husband brought you down?

A. Oh, no.

Q. How long did you remain after Mr. Notley arrived in 1885?

A. Four months.

Q. Do you remember what month it was that Mr. Notley arrived?

A. In the latter part of October I think it was.

Q. In the latter part of October, 1885?

A. Yes.

Q. What month did you go up to Hamakua?

A. In February.

Q. How long did you then stay in Hamakua?

A. Up to 1889.

(End of Page 264 Official Transcript.)

Q. Whereabouts in Hamakua were you living?
A. Down near the mill, Paauilo.
Q. You had been living there shortly after you were married?
A. I lived there nearly two years then and went to Honolulu with my mother-in-law.
Q. That was your home after you were married?
A. Yes.
Q. And you remained there, you say, until 1889?
A. Yes.
Q. Now, between the time you went up in February, 1886 and the time you left in 1889, had you made any visits to Honolulu?
A. Yes.
Q. How many?
A. One, I think.
449 Q. When was that?
A. I can't just remember; it was in 1889 that I went down.
Q. Down to Honolulu on a visit?
A. In March or April.
Q. You can't remember?
A. About that time.
Q. How long did you stay down?
A. About three months.
Q. Where did you go from there?
A. I went back to Hamakua and from there in December, 1889, we moved to Kohala.
Q. Up to December, 1889, you were on the Hamakua Plantation with the exception of these visits and then you went to Kohala?
A. Yes.
Q. When were you in Pepeekeo?
A. I was in Pepeekeo in 1883.
Q. You were not in Pepeekeo between 1885 and 1889?
A. No.
Q. How long did you remain at Kohala?
A. Ten years and six months.
Q. Leaving some time in 1900?
A. Yes, 1900.
Q. And since—what time in 1900 was it?
A. August, 1900.
Q. Since that where have you lived?
A. In Honolulu.
Q. Between December, 1889, and August, 1900, how many visits did you make to Paauilo?
A. Three only.

(End of Page 265 Official Transcript.)

Q. When were they?
A. In 1892, 1898, and 1900.
Q. How long did you stay—who went with you on the visit in 1892, what month was it?
450 No answer.
Q. Who went with you?

A. Henry, Emma and Clarence.
Q. Three of your children?
A. Yes.
Q. How long did you stay there?
A. Three weeks.
Q. That was shortly after the old gentleman got back from England?
A. Yes.
Q. In 1898 you went again?
A. Yes.
Q. How long did you stay that time?
A. Seven weeks.
Q. Who went with you that time?
A. My four children, Maria, Henry, Emma and Clarence.
Q. In 1900?
A. I had my baby, four months old, with me in 1900.
Q. How long did you stay then.
A. Only three weeks.
Q. Describe Mrs. Danford's appearance when she arrived in the country in October, 1885?
A. In what way?
Q. Size?
A. She was not quite as tall as she is now.
Q. How old was she?
A. About fourteen.
Q. She wasn't very big for her age was she?
A. I suppose not.
Q. Well, you know she is not very big now. Where did you meet her?
A. At the wharf.
Q. Where did you go then?
A. To Kakaako.
Q. What did your mother say when she met her on the wharf?
A. I don't know that she spoke to Mrs. Danford at all; she spoke to father.
Q. Did she know Mrs. Danford was coming out with Mr. Notley?
451 A. Father said he was going to bring a cousin with him from England.

(End of Page 266 Official Transcript.)

Q. She knew that, didn't she?
A. Mother?
Q. Yes.
A. I suppose so.
Q. Don't you know it?
A. I can't repeat hearsay.
Q. You can answer my question, for as you are not a lawyer yet your counsel can get up and talk about hearsay.
A. Well, father wrote and told me she was coming.

Q. Did your mother know this little girl was coming with your father?

A. I may have told her.

Q. Did you tell her?

A. Very probably.

Q. Would you be sure that you told your mother prior of the arrival of this little girl in the country that she was coming with your father?

A. I don't know whether I told her or not.

Q. Then, you can't say whether or not it was a surprise to Mrs. Notley to find Mr. Notley returning with the little girl and find him on arrival in port with the little girl in tow?

A. I think I must have told her.

Q. Hadn't you discussed the little girl in talking with your mother at all?

A. Yes.

Q. You are not sure of it, however? Are you?

A. I can't just remember; I must have talked to her.

Q. You mean you think you must have spoken to her?

A. I can't remember, but I know she—of course we both went down to the wharf; I think I told her.

Q. Did you look upon it as a matter of importance?

A. Not particularly so.

452 Q. You didn't attach any particular importance to the fact that a young cousin was coming out to the Islands?

A. No, the particular importance I laid upon it was that father was coming back.

(End of Page 267 Official Transcript.)

Q. But gave no thought to the little stranger coming with him?

A. Well, she would have been welcome.

Q. Was she welcome?

A. She was welcome by mother and I.

Q. You say your mother didn't address a word to her?

A. How could she talk to her when she didn't understand English?

Q. What did you mean by saying that at the hotel the little girl didn't address a remark to your mother?

A. Nor she didn't.

Q. One thing struck you as important to remember and the other didn't?

A. Well, Dr. Truseau's stare was quite enough for me.

Q. Are you blaming Mrs. Danford for that?

A. Well, the way Dr. Truseau stared.

Q. At whom?

A. At father not addressing his wife at all.

Q. Where is Dr. Truseau, please?

A. He is dead and gone I don't know how many years.

Q. You did remember that this little girl, as you stated, first ordered the dinner?

A. Well, she told father.

Q. And that was your language; she ordered dinner. Do you mean from the time she came here a girl of fourteen, an
453 under-sized girl coming among strangers, she immediately, even at the first meal at a public hotel, took charge of the family?

A. I do.

Q. How long did you say Mrs. Danford, then Miss Mullinger, stayed in Honolulu, on her first arrival in the country, before going up to Hamakua?

A. Probably two weeks.

Q. Where did she stay?

A. At Kakaako.

(End of Page 268 Official Transcript.)

Q. Is it a house belonging to your father?

A. He had a mortgage on the place and he considered he had a right to live there.

Q. Is that the same place your brother, Charles Notley, stayed at when he came to Honolulu in 1888?

A. Yes, the same house.

Q. Where were you living at that time?

A. I was living in Honolulu with my mother-in-law.

Q. Whereabouts is that?

A. Opposite the Lyceum, Kukui and Nuunanu Streets, now the Japanese church.

Q. How often did you see Mrs. Danford before she went to Hamakua?

A. Before she went to Hamakua?

Q. Yes, in Honolulu.

A. Five or six times probably, probably more.

Q. Did you have any more meals with her?

A. She lunched at my mother-in-law's house.

Q. That is all?

A. I don't remember any other.

Q. Will you repeat again the conversation you had with your father in February, 1900?

A. All of it? I could not remember all he said.

Q. Just as much as you can?

A. He told me that he was going to make Charley an executor of his will.

454 Q. Can you give us the language he used?

A. He had been thinking of making Charley an executor of his will.

Q. What else did he say?

A. That is all he said; my baby woke at the time and stopped him and he never repeated the conversation again.

Q. Where did this take place?

A. In father's office.

Q. Who was present?

A. He and I alone.

Q. How long did the conversation last?
A. Four or five minutes.

(End of Page 269 Official Transcript.)

Q. Can you give us anything more of that conversation?
A. That is all I can give you of the conversation.
Q. That is all you remember of it?
A. That I walked in and thanked him for giving me that $5,000. We spoke a few words and then he told me he was thinking of making Charley an executor of his will. Whether he intended to say any more I don't know.
Q. That was in February, 1900?
A. Yes.
Q. What $5,000 was that?
A. The $5,000 he gave to all of us.
Q. And where were you when he gave that to you?
A. I was in Kohala.
Q. Did you thank him more than once for giving you that $5,000?
A. I think I thanked him three times.
Q. On what occasions?
A. When he gave it to me, then I wrote again and thanked him about it, and in February I thanked him again.
455 Q. Two of these statements of your thanks were in writing were they?
A. One was in writing. Father gave me the $5,000 himself; he came to Kohala and gave it to me.
Q. He gave it to you in 1897 in Kohala and you thanked him previously?
A. Yes.
Q. When did you next thank him?
A. Three weeks after he returned home I thanked him by letter.
Q. And the third time you thanked him was in February, 1900?
A. Yes, it came up in general conversation and I thanked him again.
Q. Was that the first opportunity you had of thanking him in person when you saw him in Kohala?
A. Yes.

(End of Page 270 Official Transcript.)

Q. Didn't you testify that you were in Hamakua in the year 1898?
A. I was just going to correct myself when you spoke, in that.
Q. You made a mistake, did you?
A. That I hadn't seen him; I had seen him. It just happened that I said that I thanked him again; it came up and I thanked him for it.
Q. You were pretty thankful for the $5,000 and you thanked him in 1897. And then again when he came to Kohala; then we find you thanking him again in February?

A. Yes, why shouldn't I?

Q. Why didn't you thank him in 1898 when he was on a visit to Hamakua?

A. Because it didn't happen to come up in general conversation.

456 Q. Did he refer to the $5,000 he gave you?

A. Well, to money generally.

Q. Did he refer to the $5,000 he had given you?

A. We were talking about money matters.

Q. Answer my question, please.

A. Not directly.

Q. He didn't mention the $5,000, did he?

No answer.

The COURT: Answer yes or no and make any explanation you want to make afterwards.

A. Well, if I say yes I may not be able to correct it readily. If I remember right he was complaining to me about my brother William, how much it cost him to take care of him, there it came up he wondered what he had done with his $5,000; that is how I came to speak about it.

Q. Had you, prior to coming into court, made any statement to any person about this conversation that you had with your uncle?

A. What conversation?

(End of Page 271 Official Transcript.)

Q. With your father in February, 1900?

A. When I wrote that letter to father it was when he wrote about William.

Q. He wrote about William?

A. That was the time he wrote to William and then I answered it; that is how I came to answer it.

Q. When was that?

A. In Kohala.

Q. I am talking of this interview in February, 1900, in Hamakua.

A. I don't know exactly how it came up in Hamakua. I can't remember that.

457 Q. Had you spoken about this conversation to your counsel or anybody else before going on the stand?

A. Hasn't the counsel a right to inquire everything?

Q. Will you please answer my question? I am tired.

A. So am I. Certainly I told my counsel of it.

Q. And all you can recollect of that conversation—it lasted five minutes or so—is "I am thinking strongly of making William one of the executors of my will," and then your baby cried?

A. That impresses it strongly on my mind.

Q. What, the baby crying?

A. No; father saying he was going to make Charley an executor to his will. Previous to that I talked in a careless way. When he said that it naturally struck me as strange, and the baby cried and I walked out of the room.

Q. Why did it strike you as being so very strange Mr. Notley should think of making Charley one of the executors of his will?

A. I suppose the real reason was I hadn't thought of such a thing, and for father to bring it up like that about the will impressed it on my mind.

Q. I am not talking about leaving an impression on

(End of Page 272 Official Transcript.)

your mind. I am asking you why it struck you as strange that he should be thinking strongly of making Charley one of the executors of his will?

A. That is what caused it.

Q. What was strange about it?

A. Speaking of his will at all, that is what I thought so strange, he so remarking about Charley.

458 Q. Didn't you testify it struck you as strange that he should think of making Charley one of the executors of his will?

A. I did.

Q. What was strange about the idea of making Charley one of the executors of his will?

A. Because I never heard him speaking of a will at all.

Q. Never up to that date?

A. Not that I can recollect.

Q. Is there anything strange of thinking of an old man of some sixty—how old was your father when he died?

A. Seventy-five.

Q. Is there anything strange about the fact of an old man of some seventy-five years of age talking of a will?

A. It struck me as strange that he should tell me that.

Q. What is there strange of a father telling his daughter something about his will?

A. It just struck me.

Q. Wasn't it a fact that the idea had struck him of making Charley one of the executors is what struck you as strange?

A. It was the fact that he spoke of his will at all.

Q. Was there anything extraordinary about his talking about his will?

A. Well, I don't generally like to listen to people talking about their wills because it impresses me with the thought of dying.

Q. Well, the idea was that it struck with horror that

(End of Page 273 Official Transcript.)

459 possibly the old man might die?

A. Well, it gave me that feeling.

Q. Was that what gave you this strange feeling all over?

Mr. KINNEY: I object to that. She has not spoken of having a strange feeling all over.

The COURT: I don't recollect any testimony of that kind.

Mr. STANLEY:

Q. Did you get a strange feeling all over you when he told you he was thinking strongly of making Charley an executor of his will?
A. You will have to describe what a strange feeling all over is.
Q. A woman knows more what a strange feeling is.
A. So does a man.
Q. Is there anything strange about the fact that Mr. Notley was going to make Charley one of the executors of his will?
A. It was his speaking of a will that struck me as strange; that was the part that struck me as strange.

The COURT:

Q. Who met your father and Miss Mullinger when they arrived from England?
A. My mother and I.
Q. And you remained four months in Honolulu?
A. About four months.
Q. Did your mother remain there too?
A. My mother went with father and Miss Mullinger to Hamakua.
Q. How long did they stay in Honolulu?
460 A. About two weeks.
Q. Where did they reside then?
A. In Kakaako. I was staying with my mother-in-law, Mrs Hughes.
Q. Where did your father and mother reside?
A. In Kakaako with my mother also. My own mother; I was staying with mother Hughes.

Mr. KINNEY:

Q. Your mother-in-law?
A. Yes, my mother-in-law.

(End of Page 274 Official Transcript.)

Mr. STANLEY:

Q. Can you tell me when it was Mrs. Danford first went to school in these islands?
A. In the latter part of January, I think, or the first week in February.
Q. Of what year?
A. 1886.
Q. And where did she go to?
A. Mrs. Wallace's.

The COURT:

Q. Where in Kakaako, with reference to your mother-in-law's place, did your mother and father and Miss Mullinger reside?
A. I could not tell the place now.
Q. Was it far from where you lived?
A. Quite a distance away.
Q. During the two weeks they resided in these premises in Kakaako, did you visit there?

A. Yes, I used to go down and see them.
Q. Where did you live?
A. Kukui street and Nuuanu.
461 Q. Out St. Louis College way?
A. Yes, on Nuuanu street, the house opposite the Japanese church now. It used to be called the Lyceum.
Q. At the time you received $5,000 and your brother Charles received $5,000, did William and David also receive $5,000 each?
A. So father told me; he said he gave $5,000 to each of his four children.
Q. That was in 1897?
A. Yes.
Q. Was David at that time working on the wharf in Honolulu?
A. I don't know.

Mr. STANLEY:

Q. Where was David?
A. He was at Honolulu; he went working on the wharves—I don't know because I didn't hear about him for a good many years, so I can't say.
Q. Wasn't he in the habit of visiting you?
A. No, he came and saw me in 1890. That was the last time I saw him.

(End of Page 275 Official Transcript.)

Mr. DAVID NOTLEY, sworn on behalf of contestants, testified as follows:

Mr. KINNEY:

Q. How old are you, David?
A. Thirty-five.
Q. Thirty-five?
A. Yes, sir.
Q. Are you a graduate of San Mateo?
A. Not exactly a graduate.
462 Q. You were there three years?
A. Two years.
Q. When did you come home?
A. In the summer of 1888.
Q. Can you talk English now as well as you did then?
A. Not at all.
Q. How is that?
A. Being amongst the dock laborers.
Q. Can you talk much English?
A. No; all Hawaiians and Portuguese living down there; I can't be talking English all the while.
Q. Do you remember an occasion when your father looked you up in Honolulu?
A. Yes, sir.
Q. When he looked you up specially, what time was that?
A. That was in 1899.
Q. What month in 1899?
A. November the 6th or 7th, I think.

The COURT:

Q. Were you working on the docks then?
A. Yes, sir.

Mr. KINNEY:

Q. Where did he find you?
A. He found me piling coal in the (Gov.) coal shed.
Q. What did he say to you?
A. He told me he was three days looking for me, and this is the third day when he found me, and he wished to see me out at Mrs. Danford's.
Q. When ?
A. On that evening, on a principal thing that he wants to speak to me.
463 Q. You mean by principal an important thing?
A. Yes, important thing.

(End of Page 276 Official Transcript.)

Q. Did he name the hour for you to be there?
A. He told me to be there at six o'clock, but I told him I could not very well get there at six o'clock; that I got through work at five, and was all covered up with the black diamonds; it would take a long time to wash me and a long time to get home; I told him I would get out as soon as I could.
Q. What time did you get out?
A. Between half-past six and seven o'clock.
Q. Who met you at the house?
A. Mrs Danford.
Q. How did she receive you?
A. Received me cordially
Q. What did she say?
A. She said "How do you do?" and how I feel, and she took me to a chair on the veranda. She got my father to come out and he asked me to go to dinner with him, and after dinner we came out on the veranda and started in on talking.
Q. Did you have your dinner there that night?
A. Yes.
Q. Who was present at that time?
A. Mrs. Danford and my father.
Q. Where was Mr. Danford?
A. He had gone out again.
Q. Was he there when you came?
A. He was inside washing, getting ready for dinner.
464 Q. What was this talk on the veranda after dinner?
A. Especially she asked me how I was and why couldn't I get a better job? I told her I couldn't help it because I was pressed down to that place and had to earn the money wherever it comes, and she told me, have you seen your brother and your sister-in-law, and I said, "No, I haven't seen him yet."
Q. What brother was that?
A. Brother Charley.
Q. All right.

A. Only this afternoon when he told me down to the Post Office—I met him as I was at the Post Office—and

(End of Page 227 Official Transcript.)

he told me my father wanted to see me; he told me I had to meet our father.

Q. What else was said?

A. Then she said to me she was glad that I didn't associate with my brother at all. What I should say is, that I didn't go there and meet him every day. I asked, "Why are you glad?" She didn't answer, but my father interfered that time.

Q. Interrupted?

A. Yes, and my father said, "You are right, Emma, that you should advise your cousin already, but wait a minute; I will tell you a little more of the story, David." Then my father commenced to tell me about some papers that he wanted to be signed in Hamakua while my brother was stopping there, and he tried to ask my brother to ask my mother to sign them, and he says that my brother had more influence over my mother; that if my mother didn't
465 sign it she would stand all the consequences upon her head.

Q. The consequences to be upon her head?

A. Yes, all the troubles upon her head; consequences I suppose is troubles?

Q. What else did he state?

A. He stopped a while, and I urged to go home because it is late. I had to get up early in the morning to go to work. I couldn't be delayed or else I can't make money for myself. He told me to wait a minute and go inside the room there, "I got something to say to you." I walked into his room with him and there he made me promise to be up in Hamakua before the end of November.

Q. Before the end of November?

A. Yes, and I told him I could not very well do it, on account that I am busy at work. If I can get through work quick enough I will try to be up there; but he still urged me to promise, so at last to do him a favor I promised him.

(End of Page 278 Official Transcript.)

Q. That you would be up there by the end of November?

A. Before the end of November.

Q. Did he say what for?

A. Afterwards he told me that he got certain papers that he wished to be signed by mother, and that he wished me to help him and ask my mother to sign it; what kind of papers I don't know.

Q. Did he give you anything that night?

466 A. Then he gave me $2,000, a check on Bishop & Co. for $2,000. I thanked him for it, and as I was going out he reminded me of the promise.

Q. What promise?

A. That is, to go to Hamakua before the end of the month.

Q. Did you go?

A. I couldn't go.
Q. Why not?
A. I had taken ill the week before I was getting ready to go.
Q. Later did you go?
A. No.
Q. Why not?
A. On account of the bubonic plague.
Q. Quarantine?
A. Yes, quarantine.
Q. Did he tell you what papers he wanted you to get your mother to sign?
A. No, he didn't tell me.
Q. When you came out did you see Mrs. Danford?
A. Yes, I bid them all good-night, then went home.
Q. Who was present when your father spoke about consequences that your mother would have to stand?
A. Mrs. Danford.
Q. Tell us again what Mrs. Danford said about Charley and you.
A. That I—she was glad that I didn't go down to associate with my brother at all.
Q. Didn't you associate with your brother?
A. Well, he only just got back from Hamakua, and I was in Honolulu ever since 1888.

(End of Page 279 Official Transcript.)

467 Q. And she said what?
A. She was glad that I didn't associate with my brother.
Q. Who said you hadn't to associate with your brother?
A. She asked me if I had gone there and seen them. I said, "No; really I didn't have time to go there and see them."
Q. Then she said she is glad you didn't associate with your brother?
A. Yes.
Q. Where was your father when she said that?
A. He was standing there.
Q. Did he come into the conversation?
A. When he heard what I said, "What made you glad?"
Q. Tell me again as best you can what it was, this statement about your mother.
A. My father said to me a couple of words before that; he tried to ask my brother Charley to ask my mother or explain to my mother to sign a certain lot of papers.
Q. Did you know what the papers were?
A. No, I didn't know anything about them: this is what he was telling me, and he said that Charley had so much influence over my mother, but if my mother didn't sign the papers she will have to stand the consequences on her head.
Q. Did he say whether she signed or didn't sign?
A. He didn't say.
Q. Whether she signed or not?

281

No answer.

468 Q. While you were at San Mateo did you receive letters from your father?

A. Yes, I did.

Q. Have you kept any of those letters?

A. No.

Q. Did you receive any letters just before the last term

(End of Page 280 Official Transcript.)

of school from your father.

A. In the latter part of February or the beginning of March I received a letter from my father.

Q. What year was that?

A. 1888.

Q. What was the purport of the letter?

Mr. DAVIS: I object to that, if your Honor pleases.

The COURT: The objection will be overruled.

Mr. DAVIS: I note an exception.

The COURT: Exception allowed.

Mr. KINNEY:

Q. What was the purport of it?

A. My father wrote over to me stating——

Mr. DAVIS (int.): I object now to what the purport of it is. He can give the contents word for word as near as he can.

No ruling.

Mr. KINNEY:

Q. What did it say in the letter as near as you can give it?

A. My father wrote to me and said, "When your vacation, summer vacation, comes," that I may pack myself and leave

469 school and wander in the States and need not call him father any more.

Q. Did he give any reason?

A. No, he didn't give any reason.

Q. Did you receive any letter after that?

A. Then in May he writes to come back, that he had something for me to do in the Government Building in Honolulu.

Q. What year was that?

A. In 1888.

Q. Where was he at the time?

A. In the legislature.

Q. A member of the legislature?

A. Yes.

Q. He said he had a job for you?

A. Yes.

Q. Did you come down?

A. Yes.

(End of Page 281 Official Transcript.)

Q. Where was he when you arrived in Honolulu?
A. In Kakaako; I met him there.
Q. How did he greet you?
A. When I got down to Kakaako I met my mother first. I asked my mother, "Where is father?" She said "Outside." I stayed outside on the veranda and waited for him.
Q. When he came what happened?
A. I shook hands and said, "How do you do, papa?" He held out his hand and said, "What are you going to do?" I said, "Well, I should think that you ordered me back and you got a job for me."

470 Mr. DAVIS: Does your Honor think there is sufficient proof before the Court of the destruction of those letters? Hasn't he to show when and how they were destroyed?
The COURT: If you insist upon it, of course he would have to show it.
Mr. DAVIS: I move it be stricken out.
The COURT: The motion is denied.
Mr. DAVIS: I except to your Honor's ruling.
The COURT: Exception allowed.

Mr. KINNEY:

Q. When you said that, what did he say?
A. He said to me he hasn't got anything for me to do.
Q. Did you get work finally?
A. After that night I was six months hunting out for something to do.
Q. What job did you get?
A. Working on the docks.
Q. Were you with your father when you left Waimea and the home was to be established at Paauilo?
A. I was in school then. During the summer time I was at home.
Q. You knew the homestead?
A. Yes, sir.
Q. Are there any trees on the homestead?
A. Not when we came there.

(End of Page 282 Official Transcript.)

Q. Were they planted?
A. Yes, we planted trees, myself and my brother Tommy that died, and the family.
471 Q. What other members of the family planted trees there?
A. There is my brother Charley, my sister, my mother, my sister-in-law and William. When they haven't anything to do in the fields they came to help my brother Tommy and myself.
Q. What kind of trees were planted there?
A. Monkey-pod trees, Eucalyptus trees and the Silver Water trees.
Q. Any fruit trees on the place?
A. Yes, fruit trees, pear trees and orange trees and lime trees.
Q. Oranges, limes, pears?
A. And peaches.

Q. That is, planted by different members of your family?
A. Yes, sir.
Q. Are those growing at the home or were they growing the last time you saw them?
A. The orange tree I planted is planted now in a different place.
Q. But those trees that were planted, are they generally there to-day?
A. Most of them are not there.
Q. Are there a good many fruit trees there now, planted by your folks?
A. New trees; I don't know who planted them.
Q. Are there any old trees?
A. Only one, I know.
Q. Did you plant it?
A. Yes.
472 Q. How long since you have been there?
A. Since 1888 and 1890.
Q. You haven't been there since?
A. I have been there constructing the new addition to the old house.
Q. You have seen these pictures burned—that is, in 1891?
A. In 1890.
Q. Did you put on that addition there?
A. Yes.
Q. How long had you been there putting that addition on to the building?

(End of Page 283 Official Transcript.)

A. Two or three months.
Q. Who made the plans for it?
A. My father had the plans made first.
Q. Were those plans carried out?
A. It was all changed.
Q. Who changed it?
A. Miss Mullinger.
Q. How did that come about?
A. Because the plans at first, the new apartments are supposed to be in different rooms—the dining room is supposed to be way out facing to the Kohala side, then the kitchen comes in.
Q. Why did they change?
A. Well, I told my father not to have it that way, but he wouldn't take my advice, but at table we were talking over it and she suggested just what I wanted.
Q. What is that?
473 A. Miss Mullinger, she suggested what plan I wanted and my father agreed to it then.
Q. Did you ever visit your father in Honolulu when Miss Mullinger was there?
A. Yes.
Q. Before 1900—before 1899 have you visited your father in Honolulu?

A. Yes, sir.
Q. On what occasions?
A. When my father comes down to Honolulu on the Planters' meeting. I generally met him down to the Kinau and I took his baggage out to the carriage, and he asked me to come down the next day, that is, Sunday, down to the hotel—he used to go to the Eagle House then, and have dinner with him. I agreed on it and when Sunday comes I go there.
Q. Do you know the horse owned by Mrs. Danford, the carriage horse?
A. Yes, I do.
Q. Do you know how she got that?
A. Yes.
Q. How was that?

(End of Page 284 Official Transcript.)

A. Mrs. Danford and —— went out driving on Sunday, and when she came home she wanted the horse.
Q. Who wanted the horse?
A. Mrs. Danford.
Q. Yes?
A. And she was telling me that she liked the horse very much, and told me she was going to ask my father for it. I said, "I don't think you can get it." "Oh, that's all right; I will get it
474 just the same." After a while I seen the horse in her possession.
Q. How much did the horse cost?
A. Somewhere about $300.

The COURT:

Q. Mr. Notley, did your father give you $5,000 in 1897?
A. Yes, sir.
Q. Were you working on the wharves at the time?
A. Yes, sir.
Q. Did you continue to work on the wharves after that time?
A. Yes, sir.
Mr. KINNEY: You are working on the wharves now; you left your work to come up here?
A. Yes, sir.
The COURT: And when he gave you $2,000 in 1889 you were working on the wharves then, and continued to work on the wharves?
A. Yes, sir.

Cross-examination.

Mr. BROWN:

Q. Do you know whether or not your father bought Mrs. Hughes a horse at the same time he bought this horse for Mrs. Danford?
A. I heard of that, but didn't hear it from my father.
Q. Who did you hear it from?

A. From my sister, Mrs. Hughes.
Q. At the same time that he bought a horse for her that he bought one for his daughter?

(End of Page 285 Official Transcript.)

475 A. I didn't hear that it was bought about the same time.
Q. When was it that you heard that your sister had a horse from your father?
A. That was only lately I heard that spoken of.
Q. Before or after his death?
A. Before his death.
Q. How long before his death?
A. That was in 1900.
Q. When you heard your father had bought the horse for your sister?
A. Yes.
Q. How did you know that your father bought a horse for Mrs. Danford?
A. Just because she told me she was going to try hard and get it.
Q. When was that?
A. It was, I believe it was the same time they bought those two horses, I don't know, I can't tell.
Q. What year was it that you went to San Mateo?
A. March the 12th, 1886.
Q. When did you return?
A. June the 10th, 1888.
Q. Where were you living when you went to San Mateo in 1886?
A. Kakaako.
Q. Where was the family homestead?
A. In Paauilo.
Q. What school were you attending when you went to San Mateo?
A. I was not attending any school, I was working at Paauilo.
476 Q. And you stayed there two years?
A. San Mateo?
Q. Yes.
A. About two years.
Q. Who paid for your education there?
A. It was supposed to be my father.
Q. Did he furnish you with necessary money?
A. Spending money?

(End of Page 286 Official Transcript.)

Q. Yes.
A. About $5 a month.
Q. Did he furnish you with money with which to return here?
A. Yes.
Q. After your return home did he make you a present of any money?
A. Yes, in 1897.

Q. How much?
A. $5,000.
Q. And in 1890 did he give you any money?
A. No.
Q. When did he give you the $2,000 check you have spoken of?
A. That is 1899.
Q. When you were working on the dock in 1899, did you have this $5,000?
A. I did, till lately. I got in the hole, that is all.
Q. But at the time you were working, you had it?
A. Yes.
Q. And the $2,000?
A. Yes.
477 Q. Did you have any other sums of money?
A. What I had of my own.
Q. Any other sums from your father?
A. No.
Q. From the time you left, then, in 1886 until 1890 you never came up to Paauilo?
A. From the time I left in 1886?
Q. Yes.
A. In 1888 my father sent me up to Paauilo to count the stock on Kukaiau Ranch.
Q. In 1880?
A. In 1888.
Q. That is after you came back from San Mateo?
A. Yes.
Q. How long did you stay up here then?
A. I was up here about two or three weeks.
Q. Did you count the stock?
A. Yes, there wasn't many to count; it was only what my father bought from the States and the Horner people didn't have any.
Q. To count what stock your father bought from the States?
A. Yes, it was supposed to be imported stock.

(End of Page 287 Official Transcript.)

Q. Who imported the stock?
A. My father.
Q. When?
A. In 1887 I believe. I don't know.
Q. And he asked you to come up here and count them?
A. Yes, to see how many heads of horses and cattle.
Q. How much stock did you count?
478 A. He had fifty head of cows and over fifty head of calves to them and 100 head of sheep.
Q. And they were the stock that he ordered imported from abroad?
A. Yes.
Q. And it took you three weeks to count them?
A. I stayed there with my sister-in-law; it was rough weather then.

Q. You say that you were up here three weeks?
A. Yes, including the counting of the stock. I stayed with my sister Mrs. Hughes three weeks, she was living then at the Hamakua Mill.
Q. It was afterwards she went to Kohala?
A. Yes, it may be in the year 1889.
Q. You said you were in the Hamakua District three weeks and then went to Honolulu?
A. Yes.
Q. When you went to Honolulu, did you return to Honolulu of your own accord?
A. Yes, I returned of my own accord.
Q. Where was your father when you returned?
A. At the Legislature in Honolulu.
Q. After you went back, what did you do?
A. I went back and reported what they had there on the ranch; and at this time I haven't got anything to do, so in a while I had to look around for something to do; it wouldn't do for me to go and loaf and get fat on what my father was giving.
Q. Were you paid for counting the stock?
A. Yes.
Q. How much?
479 A. Twenty dollars.

(End of Page 288 Official Transcript.)

Q. Twenty dollars?
A. Yes, and that is all.
Q. Were your expenses paid up?
A. Yes, my passage.
Q. That you got from your father?
A. Yes, four dollars.
Q. He paid a deck passage?
A. Yes; the old "Pele" a three-master; took us about nine or ten days.
Q. At the time you went to count the stock had you received your $5,000?
A. Not at all.
Q. After you returned to Honolulu from the counting of the stock where did you reside?
A. Kakaako.
Q. In what premises?
A. In the same premises where my father resided. I went and resided with him.
Q. Was your mother there?
A. Yes, mother was there.
Q. Was Mrs. Danford there?
A. She was up at the Mist's at school.
Q. Where was your brother Charley living?
A. At Kamakela, behind St. Louis.
Q. Were you in the habit of visiting your brother Charles?
A. Yes.

Q. Frequently?
480 A. No.
Q. About how often would you visit him during the year during that time?
A. About once a week.
Q. How long did you keep that up?
A. I kept it up until they left Honolulu and came to Hawaii here.
Q. What year was that?
A. I don't know; it might be in 1889, I believe.
Q. After the legislature was over, did your father return here or remain in Honolulu?
A. He returned home.
Q. Where did you live?
A. I lived in Kakaako.
Q. So that when your father went away he left you in charge of his place in Kakaako?
A. He didn't own the place in Kakaako.

(End of Page 289 Official Transcript.)

Q. Where were you living when you lived with your father and mother in Kakaako?
A. I was living on my cousin, Jo Kamai's place.
Q. Didn't you testify that you were living at Kakaako at your father and mother's place?
A. Exactly.
Q. When he left did you still continue to live there?
A. Yes, I still live there at the same place.
Q. When did your brother return from Hamakua to Honolulu?
A. That I can't tell.
Q. Did he return?
481 A. He came in a short time and went back again, in about a week or two, and went back again.
Q. When did he return to Honolulu finally and take up his residence previous to the death of your father?
A. About 1899.
Q. In 1899 up to, say the death of your father, did you visit your brother Charley often?
A. To the death of my father?
Q. Yes.
A. No, only about two or three times.
Q. That is all?
A. That is all.
Q. What was the reason you didn't visit your brother Charley?
A. Just because I didn't have chances to go there. I was busy at work.
Q. Was there any other reason?
A. No.
Q. You are sure of that?
A. Yes, I was busy at work. Sometimes, work nights, work in the day and sometimes work the whole three weeks day and night.

Q. Did you have any disagreement with your brother Charles in regard to money matters?
A. I didn't.
Q. You said that you got in a hole?
A. Yes.

(End of Page 290 Official Transcript.)

Q. Did the money get there too?
A. I suppose the money have to go there; trying to jump in in the wrong time.
482 Q. You got to speculating with it?
A. Yes.
Q. Where are you going to work now?
A. Along the water front as a stevedore.
Q. Is that of your own volition you have done that work; that is, you have done it because you wanted to?
A. Just because I wanted to?
Q. Yes.
A. Not exactly.
Q. You didn't want to work?
A. Yes, I want to work, but didn't want to go there on my own hook.
Q. Do you blame your father or blame Mrs. Danford for having to go there?
A. I didn't blame anybody. I blamed myself, just because I didn't get another job.
Q. Is it not rather to your credit that you would go on the wharves and work?
A. Well, I have to do it, I have to make some money to live, or die, if I want to.
Q. And you wouldn't ask your father for money to help you?
A. No.
Q. You have never been to your father to ask him for a dollar?
A. I tried once when I was sick and he returned my bill back.
Q. You mean you asked him to send you a draft?
A. My mother took the bill up to my father and he sent it back to me, so I never tried to ask him any more.
Q. What was the bill?
483 A. The $10 to Dr. Truseau, my mother took it up. She asked me to take it up.
Q. It was not at your wish she took this bill up and asked your father, it was against your wish and against your desire?
A. Yes.

(End of Page 291 Official Transcript.)

Q. What was the speculation that caused this $7,000 to disappear?
A. The whole $7,000 has not disappeared. A part of it has gone.
Q. You have some left?
A. Yes.
Q. The part that went, how did it go?

A. I tried to jump into sugar stocks, I happened to jump in the wrong time.

Q. And if you had got in in the right time?

A. I would have been all right.

Q. Now, you testify that your father wrote or spoke to you about getting you to get your mother to sign some papers?

A. Yes.

Q. Did he tell you, if he had asked your brother Charley to obtain the signatures to these papers?

A. Yes, he did.

Q. What did your father say in that respect, that Charley had failed or had been successful?

A. In trying to get her to sign the papers?

Q. Yes.

A. He didn't tell me anything more of it, only he told me that he tried to get Charley to ask my mother to sign the papers and
484 it happened Charley had more influence on my mother. Then he told me if my mother don't sign the papers she will have to stand all the trouble on her head.

Q. You testified that he called you into the room and asked you to go up to Hamakua at the end of November and try and get your mother to sign some papers and that before you left he gave you a check for $2,000 on Bishop & Co.?

A. Yes.

Q. What was that $2,000 for, was that a bribe from your father to get your mother to sign documents, that he had been unable to obtain through his own influence or that of your brother Charley?

A. He didn't say that was a bribe.

(End of Page 292 Official Transcript.)

Q. Did you consider it so?

A. I didn't.

Q. Why did you say that he asked you to go up there at the end of November and obtain or try to get your mother to sign these papers and then on your leaving he had handed you a check for $2,000, why did you make that statement in that manner?

A. Well, it was that way.

Q. When you made that statement now and at the time that the money was given you, did it pass into your mind that this $2,000 that your father gave you then, was a payment or a present to you?

A. A present to me.

Q. For obtaining or inducing you to obtain the signature
485 of your mother to any of these documents, was that the impression in your mind?

A. No, he handed me the $2,000 and said, "I give you this as a present." I thanked him for it. I had no impression whether he wanted to bribe me. I don't wish to say that my father had bribed me for anything.

Q. And you don't wish to convey to the jury that impression?

A. I don't—he never expressed himself as a bribe to me.

Q. When you made that statement this evening you had no in-

tention of conveying to the jury here that the $2,000 tendered you by your father, after the conversation spoken of, was intended as a bribe or inducement to you to go to Hamakua and work on your mother to obtain her signature to these documents, whatever they might be?

A. Oh no, not at all.

Q. Quite on the contrary, that is?

A. He merely gave it to me as a present, that is all I thought of it; just because I thought a wandering boy like me should get $2,000 from his father, I believe that is a very good thing.

Q. Did that astonish you as much as when he gave you the $5,000?

(End of Page 293 Official Transcript.)

A. Certainly.

Q. You were very much astonished that a wandering youth like you should get $2,000 from his father?

A. I don't know why he gave it to me but I took it as a kindness to his younger son as a wandering boy.

486 Q. Why didn't you, after you came from San Mateo, why didn't you go to Paauilo and seek employment on the plantation in which your father was interested?

A. I will explain that story. I asked my father three or four times, when the Kinau was blowing the last whistle, "Father, I want you to take me to the plantation." And he said, "No, go and look for your own living." I was penniless and then I had to suffer the consequences.

Q. Because you were penniless you have to suffer the consequences?

A. Yes, I had half a dollar in my pocket and had to live on five cents a day.

Q. What were you doing with this $7,000?

A. That was afterwards, that is when you asked me when I came back from San Mateo.

Q. How about the job in Kukaiau, how soon after did you get that job?

A. I went up in August I think and returned in the beginning of September I believe.

Q. In June wasn't it, from San Mateo?

A. Yes.

Q. How did you go up there to count the stock?

A. In August the same year.

Q. Now you say that you came up again to Paauilo, that there was something about building an addition to the house?

A. Yes.

Q. What year was that?

A. That is in 1890.

Q. Who asked you to come up?

487 A. Father.

(End of Page 294 Official Transcript.)

Q. What did you come up for?
A. To put in a new addition to the house.
Q. Who drew the plans?
A. Father drew the plans for me, that is, a rough sketch of it.
Q. Were they altered?
A. Yes, I tried to alter them, but he wouldn't consider what I wanted.
Q. Who wouldn't consider it?
A. My father.
Q. Then after the change was made in the plans, was the house built?
A. Yes, as it is now.
Q. Who built it?
A. I built that new department, that is, with the Japs, and when we got through I left the place and went to Honolulu.
Q. Were you paid for your work, did your father pay you?
A. Certainly.
Q. At the time that you were there did you ask your father if he had further work for you, or did you tell him you would like to stay on the plantation?
A. I didn't ask him.
Q. Then you, of your own volition, returned to Honolulu?
A. Yes.
Q. Did you ever work in Lucas' Planing Mills in Honolulu?
488 A. Yes sir.
Q. Previous to that where did you work?
A. On the docks as a government carpenter.
Q. Who got you that job?
A. Rowell.
Q. Do you know whether or not that position was obtained for you by your father or through his influence?
A. Through his influence.
Q. Then afterwards you went to Lucas?
A. Yes.
Q. To learn the carpenter trade there?
A. I did.
Q. When was it you went on the docks; that was previous to that?

(End of Page 295 Official Transcript.)

A. Down to the dock?
Q. Yes.
A. Before that.
Q. When was it that you got your job under Rowell?
A. Before that.
Q. What year?
A. 1888, in the same year.
Q. After you came back?
A. Yes.
Q. How long did you stay with Lucas?
A. About six months.

Q. How long did you stay with Rowell?
A. Eight years and six months off and on.
Q. How much time did you devote on the coal docks?
A. How much time?
489 Q. How much time.
A. Most of the time.
Q. Did you give six months to Lucas, eight years and six months to Rowell on the government work? How long did you work on the docks then?
A. That eight years with the government work is off and on—I don't claim that I made—it is eight years and six months off and on.
Q. How long a time did you work for the government?
A. If I should straighten it out, I only make it six years.
Q. Six years steady?
A. Yes.
Q. Did you ever drive tramcars in Honolulu?
A. I did.
Q. How many years?
A. A year and a half.
Q. So you had six months with Lucas?
A. Yes.
Q. And six years with the government work?
A. Yes.
Q. And a year and a half with the tram cars?
A. Yes.
Q. Now since you drove the tramcars you have been on the wharves all this time?
A. Yes, to this time.
Q. Did you ever have any conversation with your father as to the disposition of his property?
A. I never had any.

(End of Page 296 Official Transcript.)

490 Q. Did you know whether or not he made a will? Did he ever tell you or did you know from him that he made a will?
A. I suppose he doesn't want to talk with me about it.
Q. Have you and he had any talk as to the disposition of his property.
A. I should say I wouldn't want to hear of anything.
Q. He never spoke to you of the disposition of his property?
A. No.
Q. Did Mrs. Danford ever have anything to say to you about the disposition of your father's property?
A. No.
Q. Never?
A. No.
Q. Are you positive on that evening when you had dinner at Mrs. Danford's house, when your father gave you this check for $2,000 on Bishop & Co., are you positive Mr. Danford was not home?
A. I am positive.

Q. You are positive of that fact and you so swear?
A. I do. There were only three of us there; when I came Mr. Danford went off for a while and came back.
Q. Was he at the dinner table?
A. He was.
Q. After dinner he went off?
A. Yes.
Q. How long was he gone?
A. I don't know how long.
Q. Five minutes?
491 A. I can't tell that.
Q. Ten minutes?
A. I can't tell that.
Q. 15?
A. I could not say fifteen or whatever time it was.
Q. Twenty?
A. I can't tell.
Q. Was it one minute?
A. One minute might mean one hour or two hours.
Q. According to your way of calculation one minute might mean an hour?
A. I could not tell. I stayed there an hour or an hour

(End of Page 297 Official Transcript.)

and a half and left.
Q. During that hour and a half that you were there, was Mr. Danford gone from his home five minutes?
A. He went more than that.
Q. Then minutes?
A. More than that.
Q. It wasn't fifteen minutes?
A. As I said, I should say about an hour and a half or less.
Q. But Mr. Danford was gone?
A. Yes.
Q. If you were there only an hour and a half, and during that time you had dinner and Mr. Danford was there, I don't see how he could be absent an hour and a half.
A. Didn't I state that I was there, that I stopped there
492 an hour or an hour and a half afterwards—after the dinner, I mean?
Q. Well, if you stayed there an hour and a half after the dinner, how long was it after the dinner and before you left that Mr. Danford returned to the house?
A. Just before I left. When I was in with my father and came out, Mr. Danford just walked in.
Q. He just walked in then?
A. Yes.
Q. So that, from after dinner until the time you left it was an hour and a half?
A. About that.
Q. And that during the whole of the time Mr. Danford was not in the house or on those premises—that you will swear to?

A. Well, he might be outside in the yard; there was only three of us in there—on the veranda, I mean.

Q. Didn't you say that he went away from the house?

A. He went off from the house; whether he went in the stable to look after the horse or somewhere else I don't know, but I didn't see him any more until just as I was leaving he walked in there.

(End of Page 298 Official Transcript.)

Q. Did that conversation with your father on the evening when he gave you the $2,000 check lead you to believe that the papers that he wanted you to go up and persuade your mother to sign had not been executed by her through the influence of your brother, Charles Notley?

A. I don't know what kind of papers he wanted me to ask my mother to sign.

493 (Reporter reads last question.)

A. That is what I think; I don't know.

Q. That is the impression that it left on your mind?

A. Yes, that my mother hadn't signed it.

Q. Did he say anything then about the influence?

A. Then he told me of the influence of my brother on my mother.

Q. In regard to that, what was it?

A. That my brother had more influence over my mother; that if she doesn't sign the papers she will find the troubles on her head.

Q. And you don't know about what those papers were?

A. I don't know about that.

Q. Your father never told you?

A. No, he never told me.

Q. And your mother?

A. I don't believe she can understand English.

Q. As a matter of fact, she can't understand English?

A. Well, she may understand; I can't tell you that.

Q. Can she speak English?

A. She can't. She might say your name in English, but she can't speak English.

Q. When this $2,000 check was given to you, you say that your father called you into his room?

A. Yes, asked me to go into the room.

Q. And offered you a present?

A. Yes, that is all.

(End of Page 299 Official Transcript.)

Q. And he didn't say anything about this money in the presence of Mrs. Danford?

494 A. No.

Q. And so far as you know, she didn't know anything about it?

A. Well, I thought I was the only lucky man at the time.

Q. Do you know as a matter of fact whether you were the only lucy man?

A. At the present time I don't know whether she had $2,000 or the rest $2,000.

Q. As a matter of fact now, do you know whether or not you were the only lucky man? That is, do you know whether or not now you were the only one who got $2,000?

A. No, sir.

Q. Did any of the rest of the family get it?

A. I see in a statement in the lower court she got $2,000, and I thought afterwards I was not the only lucky man.

Q. Do you know whether the rest of the family also got a "divvy"?

A. I don't know; of course I always tried to keep away from the others. I don't like to interfere with others' affairs.

Q. Then, Mr. Notley, I understand you to say that, that it has been your custom, from the time you left until the present time, to keep yourself aloof from the family; that you haven't been in the habit of going among them?

A. That is, I would visit them when I felt like it.

Q. But you were not intimate, or did not visit frequently at the house?

A. No.

Q. On the contrary, you keep yourself to yourself?

A. Yes, I keep myself to myself.

495 The Court here adjourned at 10:10 P. M. until 9 o'clock tomorrow morning, the Court duly admonishing the jury.

(End of Page 300 Official Transcript.)

TUESDAY, *January 27th*, 1903—9 a. m.

Jury and parties all present.

Mr. DAVID NOTLEY on the stand.

Continuation of cross-examination.

Mr. STANLEY:

Q. Mr. Notley, you stated that you had dined at the house of Mr. and Mrs. Danford on the sixth of November, 1899?

A. About the sixth or seventh.

Q. It was about that time?

A. Yes, about that time.

Q. Did you ever dine there at any other time?

A. I think previous to his death.

Q. The night before his death?

A. Yes.

Q. The night of the death?

A. No, the night before the death, Thursday night.

Q. And these are the only two occasions on which you dined at Mrs. Danford's house?

A. And after the funeral.

Q. But up to the time the old gentleman died?

A. Yes.

Q. It is a fact these are the only two occasions on which you dined?
A. I think so; yes.

496 Redirect examination.

Mr. KINNEY:

Q. Did you dine there after the funeral?
A. Yes.
Q. How many days after the funeral?
A. The day after the funeral.
Q. How did you come to dine there after the funeral?
A. I went to thank them for looking after my father.
Q. And you were invited to come to dinner?
A. Yes.
Q. Was there any other member of the family there besides yourself?
A. No, sir.
Q. This conversation in reference to the papers being signed—where was that held?

(End of Page 301 Official Transcript.)

Mr. STANLEY: I object. It has been fully gone into *to* on direct and also covered by cross-examination.
The COURT: The purpose of re-direct examination is to fill out and strengthen the examination on cross-examination. The objection is overruled.
Mr. STANLEY: I would like to note an exception to the ruling of your Honor.
The COURT: Exception allowed.

Mr. KINNEY:

Q. Where was this talk had about signing the papers?
A. This was in father's room.
497 Q. Was there any talk on the veranda about signing the papers?
A. Outside on the veranda, about signing the papers?
Q. Yes.
A. Yes.
Q. Was Mrs. Danford there when that talk was had on the veranda?
A. Yes, sir.

Mr. Kinney here asks the privilege of recalling Mrs. Hughes. No objection offered.

(End of Page 302 Official Transcript.)

Mrs. MARIA HUGHES, previously sworn for the contestants, testified as follows:

Mr. KINNEY:

Q. Mrs. Hughes, referring to the three weeks' visit at your house, beginning in December, 1900, and extending into January, I will

ask you whether during those three weeks Mrs. Danford was in Honolulu or not?

A. Yes, she came down with father from Hamakua.

Q. When?

A. In December.

Q. And when she came what became of her?

A. I don't know where she went to stay.

Q. Did she continue staying in Honolulu?

A. No, she went down to Kauai.

Q. Was that before or after Christmas she went to Kauai?

A. Before Christmas, I heard father telling Johnny that he wanted him to take——

498 Q. (Int.) What she said doesn't matter. After Christmas until the end of your father's visit was she again in Honolulu?

A. Not at that time.

Q. In the next three weeks' visit in April, 1901, was she in town then?

A. Yes.

Q. During the first three weeks' visit did he make any present to the children?

A. Yes, to my four children and myself in the way of clothing. He gave me a dress, my daughter a dress, and gave the two boys a suit of clothes apiece as a Christmas present, besides the organ and the picture.

Q. How much of his time did he spend at home?

A. He spent most of his time that three weeks with us.

Q. Did he take any of you out driving?

A. Yes; just whoever was able to go driving went.

Q. There was driving?

A. Yes, all around the city, to Waikiki, Punchbowl,

(End of Page 303 Official Transcript.)

up to Pacific Heights and everywhere.

Q. Sports?

A. Yes.

Q. How was he in making these visits; how did he treat your family?

A. Very kindly; he was more like his old self.

Q. How long had it been since anything of that kind had occurred in your family in your relations with him, where he would come and make presents and stay with you a long time and make himself at home?

499 A. I cannot recollect an instance only before Mrs. Danford came from England.

Q. When you were living at home?

A. Yes.

Q. Was there any suggestion—was he asked for any of these things?

A. No, I didn't wish him to give the things. I tried my best to

persuade him not to, but he would have it. Eventually I consented to it.

Q. Did he buy all that he wanted?

A. I did not take all that he wanted me to.

Q. Some things you refused?

A. Yes; I didn't see the necessity for them, and wouldn't take them.

Q. On the next visit do you remember what day he arrived—on the April visit?

A. Well, he arrived on Saturday, but just the exact date I am not sure.

Q. And stayed at your home during that visit?

A. Yes, he stayed with us.

Q. Did he give the children presents then?

A. Bicycles. He saw a man riding by on a bicycle, and he saw Henry watching the man, and he asked him if he had a bicycle and he said, "No." And on the Monday morning he sent up two bicycles for the boys.

Q. These Cleveland bicycles?

A. Yes; and that evening Emma was trying one of

(End of Page 304 Official Transcript.)

the bicycles and Wednesday morning two more came up for the girls.

500 Q. Were there any more presents during the three weeks?

A. No.

Q. How long did he stay at the house?

A. Very little time at all; he would have his breakfast at seven o'clock, and at half-past seven or eight he would leave the house probably, and come in about three to have a glass of wine, and go out in about half an hour, and I wouldn't see him until nine or ten at night.

Q. Did you ask him where he had been?

A. I did once.

Q. On any occasion?

A. No; he said he was up at Mr. McIntosh's.

Q. During the April visit did you see him driving at all?

A. No, I never saw him driving.

Q. How did you know Mrs. Danford was in town?

A. Father mentioned it.

Q. Did you see her at all?

A. No; I never saw her at all?

Mr. BROWN: I move that be stricken out.

The COURT: It may be stricken out. "Father mentioned it," and the jury are instructed to disregard that statement of the witness.

Mr. KINNEY:

Q. When was your father next in town?

A. October, 1891.

Q. Was Mrs. Danford in town then?
A. Yes.
Q. Did you see her in town?
501 A. Yes.
Q. Did you see him?
A. Yes.
Q. Where did he stay?
A. He stayed with Mrs. Danford. I asked him to come and stay with me, and he said no, he was going to stay at the Danford's.

(End of Page 305 Official Transcript.)

Q. Did you ever see the two together?
A. Yes, frequently driving by.
Q. On this occasion when they were driving by, where were you?
A. On the veranda in the yard.
Q. Did your father recognize you on any of those occasions in passing by?
A. Not when he was with Mrs. Danford.
Q. If he was alone, would he?
A. Yes.
Q. How was it if he was driving in a hack and alone, would he notice you?
A. He would lean a little way out and bow. He would always when driving down Beretania street, he would look and see if any of us were outside and he would bow and look at us.
Q. Did he tell you that?
A. Yes.

Mr. STANLEY: I move that the answer be stricken from the record.

The COURT: The motion is granted.
502 Mr. KINNEY: We note an exception.

Mr. KINNEY:

Q. What would Mrs. Danford do, if anything, when she passed by with him?

Mr. DAVIS: I object. (Reads authorities.)
The COURT: The objection is overruled.
Mr. DAVIS: I note an exception to your Honor's ruling.
The COURT: Exception allowed.

Mr. KINNEY: I understand there was some question as to the date of this?
A. October, 1891.
Q. Did she bow or recognize you?
A. Never.
Q. Was there any occasion when he passed by in her company that he recognized you?
A. Never.

Q. Do you remember how long a time he spent in Honolulu during the October visit?
A. I am not quite sure how long he stayed.

(End of Page 306 Official Transcript.)

Q. Was it some days or weeks?
A. Well, it was weeks.
Q. Could you give us an idea of how often he passed with her?
A. He passed so many times I could not tell.
Q. Half a dozen times?
A. More than that.
Q. Who was present on any of those occasions when he passed by?
503 A. My husband was there on one occasion, my brother David and his wife and child, Lily and my children.
Q. During the October visit to Honolulu how many times did he call on you?
A. Twice a week.
Q. How long would he stay?
A. Well, if he came in the morning he would give me about fifteen minutes of his time; if in the afternoon, just five minutes; that is, about one o'clock, if he happened to drop in between twelve and one.
Q. Did you say anything to him about his passing by?
A. No.
Q. Did he say anything to you about it?
A. No.
Q. How was his manner towards you?
A. Sulked as if he didn't want to be in my company at all, as if he came there compulsory.
Q. Nothing unkind in his manner?
A. No, but he was so distantly cool——

Mr. STANLEY: I move that the compulsory part be stricken out.
The COURT: It may be stricken out, and the jury are instructed to disregard the testimony in regard to the word compulsory.

Mr. KINNEY:

Q. At any time during the visits you refer to did your father make any reference to Miss Barnard?
A. Yes, he told me that Emma Danford had wanted——
Q. (Int.) What visit was that, if you remember?
A. In the December visit was when he told me.

(End of Page 307 Official Transcript.)

504 Q. December, 1900?
A. 1900.
Q. What was it he said?
A. That he had—that Emma Danford wanted Miss Barnard to stay in the house as a companion to the two girls, but mother had strongly objected to it.

Q. Have you any knowledge of Mrs. Charles Notley's being ill?
A. Yes.
Q. How long an illness did she have?
A. For three years.
Q. During what years?
A. 1900–1899, I think it was 1900 and 1901.
Q. What was the trouble?
A. She had a difficult operation performed.
Q. A dangerous operation?
A. Yes, it was a dangerous operation.
Q. Did it involve nursing after her illness?
A. Yes, night and day. She had to have special nurses night and day to take care of it that time.
Q. Trained nurses?
A. Yes, trained nurses.

Mr. STANLEY: I object, and move that the evidence be stricken out as being absolutely irrelevant.

The COURT: I am doubtful about the matter, but the motion will be denied—the motion to strike out.

Mr. STANLEY: We note an exception to your Honor's ruling.

The COURT: Exception allowed.

505 Mr. KINNEY:

Q. Do you recollect whether or not—do you recollect any visits of your father to Honolulu in 1890, outside of the December visit when he came down with Mrs. Danford?
No answer.
Q. Do you remember when Mrs. Danford's baby was born?
A. Yes.
Q. When was that?
A. In August.

(End of Page 308 Official Transcript.)

Q. Of what year?
A. 1899.
Q. In 1899?
A. Yes.
Q. Her child was born where?
A. In Honolulu.
Q. Now in 1900—that is, in August of 1899. Now, coming into 1900, do you remember whether your father was in Honolulu the first half of 1900?
A. No, I can't say that I remember whether he was there or not.
Q. Where was it you met him in February of 1900?
A. That was at home.
Q. In Hamakua?
A. Yes, in Hamakua.
Q. The time when he mentioned the executorship?
A. Yes.

506 Cross-examination.

Mr. STANLEY:

Q. Do you know whether or not, as a matter of fact, Miss Barnard remained in the house after Mrs. Danford's marriage to take care of your two children—of Charley's children?
A. No.
Q. You don't know one way or the other?
A. No.
Q. Don't you know, as a matter of fact, Miss Barnard did not stay after Mrs. Danford's marriage?
A. You ask me if she stayed?
Q. I asked you, did she stay? Do you mean that she stayed or didn't she stay—which is it now?
A. No.
Q. She didn't stay?
A. No, as I stated before here, mother objected strongly to it.
Q. And she didn't stay?
A. So father stated; that is all I know.
Q. In April, 1901, you say that you didn't see Mrs. Danford at all?
A. No, I didn't see her at all.
Q. Will you give me an idea of how often you saw her in October, 1901?

(End of Page 309 Official Transcript.)

A. I could not say how often.
Q. Can you give me some idea of how often?
A. No, I could not.
Q. How long was the old gentleman staying in town in 1901?
507 A. Probably three or four weeks, I don't know.
Q. Have you any idea?
A. Three or four weeks, I don't know.
Q. Can you give me an idea in that three or four weeks how often you saw Mrs. Danford pass the house—four or five times a week, five or six times a week?
A. It was so often I never took particular notice.
Q. Was it very often?
A. Pretty often.
Q. It was so often that you could not keep count?
A. I didn't take particular notice.
Q. It was a matter of every day occurrence, was it?
A. I suppose it was.
Q. Do you mean that you suppose you saw her every day?
A. Well, I didn't see her every day.
Q. Nearly every day?
A. No.
Q. You didn't see her every day? If you didn't see her every day, can you give me some idea how often in a week you did see her?
A. No.
Q. Do you call seven or eight times so often that you would not

take particular notice; eight times in a month so often that you wouldn't take particular notice?

No answer.

Q. Answer my question, please; what are you hesitating about?

No answer.

Q. I want to get some idea from you of how often you saw her?

(End of Page 310 Official Transcript.)

508 A. And I am trying to think. No, I cannot place it.

Q. Did you see her four times?

A. It was more than that; it must have been more than that.

Q. Why must it have been more than that if you don't know how often you saw her?

No answer.

Q. Why do you state it must have been more than four times if you don't know how often you saw her and cannot give me an idea of how often you saw her? You could not say that you saw her every day; why do you say it must have been more than four times?

Mr. KINNEY: I submit we cannot spend time while she thinks out those things. I submit if the witness states her best recollection without trying to figure it out while we are waiting.

The COURT: Give your best recollection in regard to the matter.

A. Well, if I give my best recollection I would have to define it thoroughly, and I can't define it thoroughly.

Q. You say that it must have been more than four times, and my question is if you cannot say it was a matter of every day occurrence, why must it have been more than four?

A. From the fact that I didn't spend my time in the yard every day; I was too busy a woman——

Q. Then that you could not spend your time looking for them is the reason you say it must have been more than four times?

A. At those times I had not been in the yard, so I only heard when these things occurred.

509 Q. What is the reason for saying it must have been more than four; can you answer that

A. I have said I cannot exactly define it.

(End of Page 311 Official Transcript.)

Q. Do you know as a matter of fact Mrs. Danford was not going out much in the month of October, 1901?

A. Ah, Mr. Stanley, but she was.

Q. Do you know as a matter of fact Mrs. Danford was not going out much in the month of October, 1901?

A. As to that, I know nothing about her ways; I happened to hear.

Q. Did you testify on direct examination that you saw her so often that you didn't take particular notice of her?

A. That is often enough for me to see her.

Q. Once is often enough for you to see her?

A. If I happened to see her once, would I call that often?

Q. Do you know as a matter of fact that she was not going out much in October in 1901, and that she was seriously ill in November, 1901?

A. I know nothing about that; all I know is, I saw her.

Q. When you saw her, what did you see her do?

A. When she caught my eye she turned her head away.

Q. How do you know she saw your eye?

A. Because she saw me, for she looked me straight in the face and turned away.

Q. Didn't you state she just turned her eyes away? Why do you say she looked you straight in the face?

510 A. As you come along Beretania street from the way the house stands her eyes struck the house and the moment she saw any of us she turned away.

Q. Then you swear when you or any other member of the family was on the veranda or in the yard and Mrs. Danford driving by with her uncle, when her eyes would strike your house, she turned away?

A. When she saw me, I will swear she did.

Q. You say that when she drove down town her eyes struck the house?

(End of Pagge 312 Official Transcript.)

A. Anybody's eyes would, the way the road lay. She saw me, Mr. Stanley, and I know it.

Q. Didn't you say anyone's eyes would strike that house, situated back from the road, if he was looking straight in? Would your eyes see a person as far back as that?

No answer.

Q. You will swear that she passed so often you didn't take notice of any time she passed with the old man whether she saw any of the members of the family?

A. For one I know she saw my eyes and she turned away. I am not standing here to swear for my family; what they saw I cannot answer for; I speak for myself, I saw it.

Q. In what kind of a rig did you see her most often, these times you cannot count? In what kind of conveyance was she when you saw her driving and her eyes came full on that house set back from the road and she looked you full in the face and turned her head away?

511 A. It was in a double-seated carriage.

Q. What kind of a double-seated carriage?

A. I don't know what it is called. They were driving a bay pair of horses.

Q. Every time?

A. Every time I saw them.

Q. Every time you saw them they were driving in this double-seated carriage with a span of horses?

A. I am not quite sure about that.

Q. And that every time you saw them she stared you full in the face and turned her head away?

A. I know every time I saw her I caught her eye and she turned her head away.

Q. What did you expect her to do if you caught her eye? The first time what did you expect her to do if you caught her eye?

(End of Page 313 Official Transcript.)

No answer.

Q. That doesn't take long to answer, Mrs. Hughes; I am asking you a simple question. What did you expect her to do?

A. I expected her to remember that Mrs. Hughes was Mr. Notley's daughter.

Q. I am not talking about a mental operation. What act did you expect from her?

A. That is what I expected her to memember—that I was Mr. Notley's daughter.

Q. What did you expect her to do when she met you and her eye caught yours?

A. I expected her to bow.

512 Q. When had you seen Mrs. Danford last before the first time you say that her eyes struck yours as she passed?

A. I don't know that I had seen her before.

Q. In Honolulu?

A. Yes.

Q. And that was the last time you had seen her anywhere else?

A. That was in Hamakua before her wedding.

Q. How long before the wedding?

A. In April.

Q. She was married in October?

A. Yes.

Q. You refused to go to her wedding?

A. Yes.

Q. Did you ever attempt to make it up with Mrs. Danford?

A. Why should I?

Q. Did you ever?

A. No, I didn't.

Q. You had refused to go to her wedding, refused to be present, and expected that she would give you a bow when you had made no attempt to make it up?

A. Certainly.

Q. Why?

A. Wasn't she receiving benefits from mother and father for fifteen long years? It was the least she could have done to remember their daughter.

Q. Or the least you could have done was to attend the wedding and make some effort—with one who was deserted——

(End of Page 314 Official Transcript.)

513 A. When she came to Kakaako there my mother came to me and said, "I don't like that young woman; she is influencing your father. We are going to have lots of trouble." She

said this in Hawaiian. I said, "Ma, go home and shelter her as you sheltered me when a child; shelter her alone——"

Mr. STANLEY (Int.): I move to strike that out as being irrelevant and hearsay.

The COURT: I think the witness has stated her motives in her own way. I think you are not at liberty to strike now only such portions of the answers that don't please you and leave in those that do please you. The motion to strike is denied.

Mr. STANLEY:

Q. Is there anything more of it?

No answer.

Q. How long was that after Mrs. Danford came to the country?

A. Two or three days after.

Q. Did Mrs. Danford pick up Hawaiian in the three days she had been here?

A. No.

Q. Did Mrs. Notley pick up English in the three days?

A. She cannot, Mr. Stanley, but my father——

Q. (Int.) Will you answer the question, did she?

A. No, but my father understood Native.

Q. There was not *very* chance of confidential connections between Mrs. Notley and Miss Mullinger?

A. Probably there was not, but there was between Mrs. Notley and Mr. Notley.

514 Q. Mrs. Danford had no great means of making conversation with Mrs. Notley?

A. I presume not.

Q. But within three days she foresaw lots of trouble ahead?

A. So would you if you had the place she had.

(End of Page 315 Official Transcript.)

Q. Will you answer my question? Is it a fact that within three days she saw lots of trouble ahead?

A. I did the first day.

Q. Is it a fact that Mrs. Notley, Sr., your mother, within three days after the arrival of this girl in the country foresaw lots of trouble ahead?

A. She did.

Q. And you also?

A. I did.

Q. How?

A. From the manner in which she influenced father.

Q. How did she influence father?

A. To the extent that he barely spoke to his wife.

Q. Anything else?

A. That was enough.

Q. Was there anything else?

A. Not at that time.

Q. Not up to those three days, is that so, there was nothing else?

A. I went down next day after they arrived——

Q. (Int.) I asked you, was there anything else?
A. I offered to make her dress, to do the best I could for her, and the third day mother told this to me and I answered her
515 back with the request to shelter her as she sheltered me as a child.
Q. Is there anything else besides? If so, will you state what it was?
A. It was the manner in which father waited on Emma Danford.
Q. Anything else?
A. That was most particular.
Q. What is next?
A. The annoyance felt at me not going and finishing all the work for Mrs. Danford.
Q. Anything else?
A. That is all.
Q. Was this all in three days?
A. Yes.

(End of Page 316 Official Transcript.)

Q. The whole thing in three days?
A. Yes.
Q. Will you tell me the manner in which he attended her that made you see lots of trouble ahead in the coming years?
A. I said I saw it the first day.
Q. What did you see the first day that made you see lots of trouble ahead?
A. From the way she influenced father at the table. I saw that for nearly five hours.
Q. What did she do at the table?
A. That was in Kakaako. We spent probably three-quarters of an hour, less than that likely, at the table.
516 Q. Anything more than the table-cloth business—where the trouble of the table-cloth business occurred, where you said Mrs. Danford said something and the waiter didn't hear what was said, and the old man said something about a clean table cloth?
A. That occurred in the restaurant opposite the old Elite Ice Cream Parlors.
Q. On the first day?
A. Yes.
Q. Was there some trouble at Kakaako at the house when she got there?
A. Not that I know of.
Q. How long were you at the house in Kakaako before you went to the Chinese restaurant?
A. It was not a Chinese restaurant.
Q. Well, a restaurant; how long were you at the homestead before you went to the restaurant?
A. Three or four hours; about that.
Q. At the house before you went to the restaurant?
A. Yes.
Q. What occurred there at the house before you went to the restaurant during these three or four hours?

A. Why, we discussed everything; father going to England—— (Interruption by Mr. Kinney.)

(End of Page 317 Official Transcript.)

The COURT: I think that matter was gone into pretty thoroughly on the cross-examinatnion of the witness.

Mr. STANLEY: I ask the privilege to examine the witness on it now.

517 Mr. STANLEY:

Q. You said that you were three or four hours at Kakaako before you went to the restaurant; I ask you what you saw there, if anything, that made you foresee lots of trouble in the years ahead?

A. Not in the Kakaako home, while we were in Kakaako, but after we went to the restaurant.

Q. Did you see anything at the Kakaako home that made you foresee lots of trouble? Yes or no?

A. We were too busy——

Q. Answer yes or no; did you foresee any trouble?

A. Not to my recollection.

Q. Not to your recollection in those three or four hours?

A. No.

Q. At the restaurant, as I understand your testimony, it was; as you sat down to the table you saw Miss Mullinger whispering to the old man; you didn't know what she said, and shortly afterwards the old gentleman said something about, "Can't we have a clean table cloth?"

A. Yes.

Q. Is that all?

A. And then father said, "We'll go somewhere else to dine."

Q. Is that the only thing happened there?

A. Yes.

Q. And you were there about three-quarters of an hour?

A. No, we were not there more than two or three minutes.

Q. You don't know whether Miss Mullinger was asking the old gentleman for the loan of his pocket handkerchief when she
518 whispered to him, do you?

A. No.

(End of Page 318 Official Transcript.)

Q. Or you don't know whether she was asking him if he had candy in his pocket, or don't know what she said, do you?

A. I know he rose up and demanded a clean table cloth, and my father had never done that in a public place; my father has many times sat at a dining room table and never called attention to himself and family in that manner.

Q. You don't mean to lead the jury to believe that Mr. Notley didn't care about a clean table cloth?

A. That was not dirty; just one or two spots of coffee or tea on the table cloth. It had been perfectly clean that morning; from the

appearance of the cloth it looked as if it was placed there early in the morning. I don't know what Miss Mullinger said, but from father's action it was something very unusual for father to do. I emphasize it, too.

Q. Was Mrs. Notley there, too?

A. My mother was there also.

Q. Where did you go then?

A. To the Hawaiian Hotel.

Q. That was the first act that made you foresee trouble ahead, Miss Mullinger whispering to Mr. Notley, and what followed?

No answer.

Q. Was that the only thing happened there?

A. At the restaurant, yes.

519 Q. What next did you see that gave you this intuition there was trouble ahead—lots of trouble?

A. When we dined at the Hawaiian Hotel.

Q. Well, what was it?

A. Father conversing with Mrs. Danford and never bestowing a remark or a look or anything on the rest of the family.

Q. You will swear now on the solemnity of your oath

(End of Page 319 Official Transcript.)

that during that meal Mr. Notley never bestowed a word or glance on your mother or on yourself?

A. I didn't see him; I can swear to that.

(Reporter reads previous answer.)

Q. Didn't you swear there that your father never bestowed a glance or word on the rest of his family?

A. I didn't see him.

Q. You swear that absolutely; you swore that absolutely, now you wish to modify it?

A. I didn't see him. I was mortified at the attention of Dr. Truseau, the way he looked at father conversing with Mrs. Danford instead of looking at his wife and family also.

Q. Was not Dr. Truseau's attention—Mr. Notley was paying to this girl?

A. I hardly think so.

Q. Did you think of that at all? That never struck you before?

A. No, sir.

520 Q. Now you say the old gentleman in December of 1900 was more like his old-self than you had seen him for a long time; is that so?

A. Yes.

Q. How did that appear in his conduct?

A. In his manners, ways.

Q. What ways and manners?

A. He was agreeable to the children and talked very pleasantly to us all.

Q. Wasn't that his custom?

A. Not always.

Q. Had he not done that previously?

No answer.

Q. When had he not been agreeable to the children previously?
A. Not as he was that December.
Q. When had he not been agreeable to the children?
A. In December that year he was exceptionally so.
Q. Exceptionally agreeable?
A. He was.

(End of Page 320 Official Transcript.)

Q. But he was always agreeable to them?
A. Fairly so.
Q. Did you hear your daughter Maria testify yesterday?
A. Yes.
Q. Did you hear her testify when she was in Hamakua, every one in the house received the same attention and kindness?
A. Yes.

521 Q. Is there any other way in which Mr. Notley showed himself more like the old gentleman than he had ever done before?

A. When he made us all these presents he was exceptionally good.
Q. Had he made you presents before?
A. Yes.
Q. May have given you larger ones this time, is that it?
A. No, I think the $5,000 was larger than anything he had ever given.
Q. Did you notice a change in April?
A. Yes, a very decided change.
Q. What was the change from—no more presents?
A. No.
Q. And you attributed that to what?
A. To the influence Mrs. Danford had over my father.
Q. Though you didn't see her?
A. No, though I knew she was in town from what father said.
Q. And the want of presents you attributed to that?
A. Yes.
Q. Did it ever strike you it is more usual to give presents at Christmas time to the family than it is in April?
A. It may be so.
Q. Did that strike you?
A. Not with father.
Q. You didn't try to attribute the fact you didn't get presents——
A. No.
Q. You went out of your way to dig up something out

(End of Page 321 Official Transcript.)

522 of your brain, and Mrs. Danford being in town, was the cause of it?

A. When father felt like giving presents in the middle of the year, he gave them irrespective of what time it was.
Q. You know it is more usual to give presents at Christmas time than in April?
A. Yes.

Q. And when people have given presents within three months they are not likely to give them so soon after?
A. No, nor likely to be so hurried.

Redirect examination.

Mr. KINNEY:

Q. These bicycles, when were they given?
A. On the third day after father came to Honolulu, on the second visit in April.
Q. Had you arranged to go first to Mrs. Danford's wedding?
A. Yes, I had arranged to go Monday when I received the invitation on Saturday.
Q. It was worded how?
A. "To my daughter Emma's wedding."
Q. Who invited?
A. My father.
Q. Was that an invitation of your father and mother or your father only?
A. I cannot state exactly; all I remember is, "To my daughter—my daughter Emma's wedding." I was so enraged when I saw it.
523 Q. You don't know whether your mother was consulted about the issuance of these cards?
A. No.
Q. Or had you received notice she had articles of adoption in her possession?
A. That was the first time I heard of it when I read this invitation.
Q. Did you know she had articles of adoption when you read this invitation?
A. No.

(End of Page 322 Official Transcript.)

Q. Or did she claim to be adopted?
A. No.
Q. Whose handwriting and signature is that? (Showing witness paper.)
A. Father's handwriting and signature.

Mr. KINNEY: I will introduce this letter in evidence, dated March the 11th, 1898.
Mr. BROWN: All the other letters were taken under objection. The same objection and the same ruling?
The COURT: The same objection, ruling and exception will apply to that as to the other letters. It may be received in evidence and marked "Contestant's Exhibit 23."

(End of Page 323 Official Transcript.)

Miss V. M. K. NOTLEY, sworn on behalf of the contestants, testified as follows:

524 Mr. KINNEY:

Q. You are the daughter of Charles Notley Jr.?
A. Yes sir.
Q. And the deceased was your grandfather?
A. Yes sir.
Q. How old are you?
A. Eighteen, will be nineteen in May.
Q. Where were you born?
A. In Paauilo, Hamakua.
Q. In the family homestead?
A. Yes sir.
Q. Have you much, if any, recollection of your life there prior to leaving for Honolulu? Before 1890 do you have much recollection?
A. No.
Q. How old were you then?
A. Seven years old.
Q. When did you return again to Paauilo after 1890?
A. I don't know whether we left in 1890, but I returned in 1895.
Q. What time in 1895?
A. Between July and August.
Q. Of 1895?
A. Yes.
Q. Going from Hilo home?
A. Yes sir.
Q. When you arrived back at the family home who were living there, who were permanently living there?
A. My cousin, Mrs. Danford, Miss Barnard, my grandfather and grandmother were there.
Q. Your grandfather and grandmother?
525 A. Yes sir.
Q. Were you still going to school when you went there to live, had you completed your education or still going to school?
A. Still going to school.
Q. What cousin was there?
A. Mrs. Danford was there.
Q. Your cousin, Mrs. Danford, is that the one you are referring to?
A. The present Mrs. Danford.

(End of Page 324 Official Transcript.)

Q. Did you go to school at Paauilo?
A. Yes.
Q. When did you start going to school, about when?
A. I can't remember very well, but I remember going to Mr. Callendar's School, I think it must be September of the same year.

Q. That will be September of 1895?
A. Yes sir, of 1895.
Q. Was that the first schooling you had in Paauilo on your return?
A. Yes sir.
Q. Who was Mr. Callendar?
A. He was then the minister—I don't — whether he was minister or layman in Paauilo—I know he had something to do with the church?
Q. English Episcopal Church?
A. Yes sir.
Q. There was a church of that denomination there?
526 A. Yes sir.
Q. Did you alone attend Mr. Callendar's school? What of your brothers and sisters?
A. We all went to Mr. Callendar's school.
Q. By we, who do you mean?
A. My brothers and sisters, William, Johnny and Lily and myself.
Q. Did the family go to Paauilo, who went first?
A. I went first.
Q. And soon after did your brothers and sisters join to the best of your recollection?
A. Probably a month after. I am not sure of that.
Q. Did they have any schooling in Paauilo before they went to Mr. Callendar?
A. Right there?
Q. Yes.
A. No.
Q. How long did you children attend school at Mr. Callendar's?
A. Until May, 1896.
Q. What happened then?
A. Mr. Callendar left for England.

(End of Page 325 Official Transcript.)

Q. Who took the school?
A. A young lady named Miss Bryant.
Q. Did you remain at school with his successor?
A. Not at first, but after.
Q. Why not?
A. Miss Mullinger then objected to our going to her. I don't know her motive of objection but she said she didn't want us to go there to be taught.
527 Q. To go there to be taught?
A. Yes.
Q. Did she express her—well what reason did she give?
A. Because she was an American.
Q. How was she in speaking of Miss Bryant, did she speak of her in a friendly way or not?
A. Didn't seem very friendly.

Q. And the reason she gave?
A. Was because she was an American and would teach us American ways.
Q. What followed then?
A. She taught us for a few days.
Q. Was it a success?
A. To the best of my recollection, she gave it up.
Q. Where did you go then?
A. We went to Miss Bryant.
Q. How long did you remain with Miss Bryant?
A. To the end of the term.
Q. When would that be?
A. June, 1896.
Q. In the beginning of the next school year, in the fall, where did you go?
A. We were sent to Honolulu to Mrs. Mist's and attended the high school.
Q. Living at Mrs. Mist's and attended the high school?
A. Yes.
Q. How long did you remain?
A. One whole term.
Q. That would bring you home when?
A. July or August, 1897.

(End of Page 326 Official Transcript.)

528 Q. That would make it a school year?
A. A school year.
Q. Did you spend your vacation in the summer of 1897 in the old home?
A. Yes.
Q. Where did you go to school the fall of 1897?
A. We went to the——

Mr. BROWN: (Int.) I object to this question and move all of the evidence of this witness in relation to going to school and so far as has been testified to by her, be stricken out on the ground that it is immaterial and irrelevant to the issue now before the court. I ask that it be stricken out and the jury instructed to disregard it.

The COURT: The motion is denied. There may be some of it with reference to these children going to school to a certain party that is material.

Mr. BROWN: We note an exception.

The COURT: Exception allowed.

Mr. KINNEY:

Q. In the fall of 1897 after you had been at the Mist's for a year, where did you go?
A. To St. Andrew's Priory.
Q. How long did you remain there?
A. One school year.
Q. That would carry you into the summer of 1898?
A. Yes.

Q. In 1898 where was Miss Mullinger, in the summer of 1898?
A. She was in Paauilo.
529 Q. When was she married?
A. Some time in October, 1898.
Q. Was her engagement public at the time of your return?
A. We were still in School when it was announced.
Q. Did you, in the fall of 1898, go back to the school in Honolulu?
A. No.
Q. Why not?
A. Grandpa wanted us to stay in Paauilo with him.

(End of Page 327 Official Transcript.)

Q. How was that?
A. He said he would be lonely.
Q. Why so?
A. If we would go to school and Mrs. Danford was married.
Q. That you would stay there after her marriage?
A. Yes.
Q. And after she was married, did you girls stay with him?
A. Yes sir.
Q. Where was Miss Barnard, when did she leave the home?
A. She had her things there all the time till February the following year.
Q. When did she herself leave?
A. At that time she had her things there, but she stayed at Mr. Renton's.
Q. When did she cease living in your home?
A. I don't remember exactly.
530 Q. Was it before or after the marriage?
A. It was some time after.
Q. How long after?
A. I think she was staying at Mr. Renton's at the time of the wedding. I am not sure about that. I think it was a little while after. She was staying there at the time of the wedding.
Q. She is either staying at Mr. Renton's at the time of the wedding or shortly after the wedding?
A. Yes, staying down there nights and then staying at the house at different times.
Q. Who was in charge of the home after the wedding?
A. Do you mean——
Q. (Int.) After Mrs. Danford had married and gone away who was in charge of the home?
A. Some things I attended to and most of it grandma used to tell us what to do and we'd do what she told us.
Q. How long did that last?
A. Till 1902, when grandpa died at the time I was there.

(End of Page 328 Official Transcript.)

Q. Did Mrs. Danford re-visit Paauilo after her marriage?
A. About three or four months after.

Q. How long did she stay?
A. Three weeks.
Q. Was there any talk after the marriage about Miss Barnard being installed as mistress of the house?
No answer.

Q. Did Mrs. Danford have any talk with you in the February visit about Miss Barnard being installed in the home again?
531
A. She said it would be nice to have her for a companion.
Q. Tell us what she said to you in that talk, how did it begin?
A. We were talking about different things and she said she thought it would be nice to have Miss Barnard there to be a companion to us. We could go to parties with her and she would accompany us to different places and she would help me in music and several different things.
Q. How soon was that after she arrived that the conversation took place?
A. I don't remember how soon.
Q. About how soon after to your recollection?
A. About three or four days I think.
Q. After that did you hear any conversation between your grandfather and grandmother about this matter of Miss Barnard?

Mr. BROWN: I object to that. It is immaterial and irrelevant.
The COURT: I think there is no harm in testimony of that kind. It can be stricken out if a connection is not shown.
Mr. STANLEY: We note an exception.
The COURT: Objection overruled, exception allowed.

Mr. KINNEY:

Q. Did you at any time while Mrs. Danford was still at the house hear conversations between your grandfather and grandmother about Miss Barnard being installed as mistress of the house?
532
A. Yes sir.

(End of Page 329 Official Transcript.)

Q. What was it that you heard?
A. Grandma told grandpa she didn't want Miss Barnard there. She had had enough of the white ladies.
Q. That is all she said?
A. Yes.
Q. Go on?
A. And grandpa asked her why. She said because she didn't want them there. She said "Since Mrs. Danford has a husband of her own and a nice home and her husband is kind to her I think that is good enough." She did not want any more white ladies to be up there and didn't want Miss Barnard.
Q. How was your grandmother's feeling towards white ladies in general?
A. She was very kind to them every time they came to the house.
Q. Had she any objection to receiving them?

A. None at all.
Q. How did she show her kindness to them?
A. If they would say, "How do you do?" or "Aloha," she would bow and say "Aloha."
Q. Did you see anything of the white ladies at Paauilo?
A. Yes sir. Often Mrs. Lidgate would come. She would suggest some fruit whenever she heard she was there, she would sug-
533 gest sending eggs or anything at all in the yard and she would offer the Lidgate children anything that was in the garden or the yard.
Q. Did she do anything for white people that were sick or not?
A. One time when the storekeeper was sick, she sent fruit and eggs, that was her own motion.
Q. After Mrs. Danford went away were there foreign ladies entertained at the house?
A. Yes. Do you mean stayed there?
Q. Came and spent a night or person passing through?

(End of Page 330 Official Transcript.)

A. Miss Ellis, a school teacher was there a great many times; she was very fond of her. They would sit down together and try to talk as best they could. Grandmother and her pidgeon English and Miss Ellis with her Pidgeon Hawaiian; and Miss Ellis would eat poi with her sometimes. She used to make presents to Miss Ellis now and again.
Q. After 1898 did any foreign ladies come to the house and receive entertainment? Persons passing through or visiting that you remember?
A. I don't remember ladies.
Q. Foreign gentlemen?
A. I remember gentlemen.
Q. Who?
A. After 1898 was it?
Q. Yes and that year?
534 A. Once Mr. Frank Stanley, another time Mr. Graham, I think he had something to do with the foundry.
Q. Any others?
A. I don't remember them all, but there were several men I never saw before came there.
Q. How did your grandmother treat them?
A. She was very kind to them. She didn't send them away. If they bowed to her she bowed to them.
Q. How about entertainment?
A. She saw their rooms were fixed up nicely and told us where to put them.
Q. Did you say that she didn't like this particular lady who wanted to be house-keeper?
A. She didn't like this particular lady.
Q. How often did you hear your grandmother and grandfather discussing this subject?
A. Quite often, I don't remember how many times.

Q. In the morning, evening or when?
A. She had in the morning before grandpa went out of the bedroom.
Q. Where was your room in reference to this bedroom?

(End of Page 331 Official Transcript.)

A. Right next to theirs.
Q. Could you hear the talking between the two?
A. Yes.
Q. Having a morning discussion then?
A. You might call it that. There were several mornings I heard grandma suggest it, and she told grandpa she didn't want that.
535 Q. Suggest what?
A. That she didn't want Miss Barnard there.
Q. What was the suggestion?
A. One day he said "Don't you think it would be a nice thing for you?" And she said she could attend to her own grandchildren and didn't want anybody else to do it.
Q. Did Mrs. Danford go out to you to hear any of this talk?
A. No.
Q. When did you first hear this discussion going on between your grandmother and grandfather?
A. Soon after Mrs. Danford said something about it.
Q. After her arrival?
A. Yes, that is the first time.
Q. Had your grandfather, between the date of the marriage October, 1898 and February, when Mrs. Danford came, between those dates, had he ever suggested that he needed a house-keeper?
A. Not to my recollection.
Q. Had you felt any yearning for a chaperone or a companion or anything of the kind?
A. No.
Q. Were you there the day that Mrs. Danford left Paauilo to go back to her husband on that visit?
A. In February?
Q. Yes.
A. Yes sir.
Q. What happened that morning, if anything?
A. Grandma didn't want grandpa to go.
Q. Was he going?
536 A. He was going, he had an intention of going.

(End of Page 332 Official Transcript.)

Q. How do you know that?
A. He had prepared to go.
Q. What preparation had he made?
A. He had his clothes packed and had a valise.
Q. Anything besides the valise?

A. I think a trunk.
Q. Was it usual for him to take a trunk on these trips to Honolulu?
A. He usually took one of those telescope baskets. I did not see a trunk before. I think it was a trunk besides his telescope valise.
Q. When did you first learn your grandfather was going back with her, that he was planning to go back with her?
A. One or two evenings before.
Q. Who did you learn it from?
A. Mrs. Danford told me he was going to accompany her.
Q. Had you heard it before that evening?
A. Only from Mrs. Danford.
Q. On the day that he started to go what happened?
A. Grandma wouldn't let him go.
Q. Tell what happened?
A. She told grandpa she didn't want him to go. Grandpa insisted on going; I don't know what happened, but I know I had to sew some buttons on his vest.
Q. Did you hear any noise first?
A. Yes, I heard grandma speaking in Hawaiian, telling him she didn't want him to go. He was to stay home, she didn't want him to go with the white lady.
537
Q. Did she say white?
A. Because she had a husband of her own, that she didn't want a white lady to be talking her husband away, to escort her home.
Q. What was your grandmother doing when you arrived?
A. She had hold of grandpa when I came out after the noise I heard.

(End of Page 333 Official Transcript.)

Q. Hold of him where?
A. Here. (Showing.)
Q. On the vest?
A. Yes.
Q. What was she doing?
A. Telling him he was to stay home and talking very loud.
Q. Did she make any other noise?
A. She wailed.
Q. What was Mrs. Danford doing?
A. She was in the bed room.
Q. What did she do before she went in the bedroom?
A. I did not see it, but she told me——
Q. Already she told you?
A. She told me grandmother pushed her.
Q. Where was the carriage then?
A. Out in the drive under the pear tree, near the pear tree.
Q. Who was in the carriage?
A. The driver.
538
Q. Who was the driver?
A. A Japanese, Nakamoto.

Q. When you got there you say that Mrs. Danford had gone into her bedroom?
A. Yes.
Q. Was there anything said by your grandmother to indicate she thought whether or not she would see her husband again?

Mr. STANLEY: We submit there is no right asking leading questions.
The COURT: Objection sustained.

Mr. KINNEY:

Q. What happened after that, after Mrs. Danford went in her room?
A. Grandpa stayed at home and he didn't go with her.
Q. Who sewed the buttons on?
A. I did.
Q. What was it, on what?
A. On his vest.
Q. Did he say anything about the trouble?
A. He said to me, "I want you to sew the buttons on my vest." That is all.
Q. And what became of Mrs. Danford?
A. She drove away with the Japanese man.

(End of Page 334 Official Transcript.)

Q. What frame of mind was she in, what was her appearance when she came out and started to drive away?
A. She had been crying before that.
539 Q. Was her condition then, was she calm or excited, pleased or angry or what?
A. I don't think she was pleased.
Q. What did she say?
A. She said, "Goodby" to me.
Q. Did she say anything else about the place?
A. She said it would be the last time she would come there.
Q. Who else was there besides you and your grandmother?
A. When she said that?
Q. Yes.
A. I don't know whether Lily was there or not. It was just before she left.
Q. Was your grandmother there?
A. Not when she said that.
Q. Did you give her anything when she left?
A. We had already made her some leis and put them on her.
Q. Did you make any reference to what you had seen?
A. No.
Q. You greeted her pleasantly when she left?
A. Yes.
Q. When she came along what did you notice in reference to her person? When she said she'd never come back, when she said, "This is the last time I will come here," what was her attitude?

A. She was not happy about it.
Q. What was the attitude of her person?
A. I think she was a little cross with grandma. Do you want to know how she was dressed?
540 Q. Where were her hands?
A. Down by her side.
Q. In what position?
A. She said, "It is the last time I will come here."
Q. As you have it that way?
A. Yes, "It will be the last time, I will never come here again."

(End of Page 335 Official Transcript.)

Q. You treated her kindly and she went off?
A. Yes.
Q. Did you notice any trouble between your grandfather and grandmother after she left?
A. I think it was a week after, I am not sure about —, but I know there was some trouble.
Q. What was the trouble?
A. About Miss Barnard. That is the day grandpa struck grandma.
Q. He struck her again?

(Mr. Brown objects.)

Mr. KINNEY:

Q. Where were they when he struck her?
A. In the bed room.
Q. What was the result of that striking?
A. Grandma's eyes were swollen.

The COURT:

Q. Did you see that?
A. No, I didn't see him strike her.

Mr. KINNEY:

Q. Where were you when he struck her?
A. In the next room.
541 Q. In bed?
A. I heard the talk between the two.
Q. What did you hear leading up to the striking?
A. Something about pictures and Miss Barnard.

The COURT:

Q. How did you learn it was your grandfather struck your grandmother?
A. We heard like that (clapping her hands) and he said "Take that," in English.

Mr. KINNEY:

Q. Did you see her condition after she came out?
A. Yes sir.

Q. How long was she marked that way with the blow, how long did it show?
A. Quite a while.
Q. Did she go out in public?
A. She went to church that day, Sunday.
Q. Was it on a Sunday then?
A. Yes sir.

(End of Page 336 Official Transcript.)

Q. And she was around the house after that?
A. Yes she was around and about.
Q. Referring back to this occasion when Mrs. Danford was there, who came there first among you children, who got to the veranda where——(Mr. Stanley interrupts.)
A. Lily and Johnny were there before.
Q. Were where?
A. There.
Q. What do you mean by there?
A. On the veranda.
542 Q. Where did Mrs. Danford make the remark that she wouldn't come back?
A. When she was going out of the bedroom door in the back.
Q. Do you know whether or not correspondence was maintained between Mrs. Danford and Mr. Notley after she left and went to Honolulu and Kauai?
A. Yes.
Q. Did you know her handwriting?
A. Yes sir.
Q. Who handled the mail?
A. Sometimes grandpa. Very often grandpa did; sometimes Johnny and sometimes I would go up.
Q. And you would see letters in her handwriting?
A. Yes sir.
Q. Addressed to your grandfather?
A. Yes sir.
Q. How long was that correspondence maintained?
A. When grandpa was in Honolulu and Mrs. Danford was there of course he wouldn't have letters from her addressed to Paauilo, but when grandpa was in Paauilo and Mrs. Danford—last year she wrote all the time.
Q. Did you see any letters from others—from other members of the family to your grandfather?
A. Aunt Maria.
Q. What became of the letters that your grandfather received from Mrs. Danford?
A. Tore them up.
Q. How do you know that?
A. Because I have seen the pieces in the waste basket

(End of Page 337 Official Transcript.)

and have seen him tearing them up.

543 Q. Do you know of any occasion when he ever left any of her letter- around undestroyed?

A. Not to my recollection.

Q. Did he do that with letters from his daughter?

A. He left her letters with us.

Mr. DAVIS: I move to strike that out, what he did with other letters. It is a sort of innuendo.

The COURT: The motion is denied.

Mr. DAVIS: I note an exception to your Honor's ruling.

The COURT: The exception is allowed.

Mr. KINNEY:

Q. You have spoken of a Miss Ellis who was fond of your grandmother and of whom your grandmother was very fond; when was she at Paauilo?

A. I think she came in 1900, I am not positive about that.

Q. Was Mrs. Danford ever there at Paauilo when Miss Ellis was?

A. Yes sir.

Q. What was Miss Ellis there for?

A. She was teaching.

Q. Who?

A. At the private school, teaching children.

Q. Were you attending?

A. Yes.

Q. She was teaching a private school where?

A. At Paauilo, at the Hall.

Q. Where was she taking her meals?

544 A. She had luncheon with us, sometimes dinner, then she stayed the night and took meals, and would stay at Mr. Lidgate's place.

Q. Did she continue to take her meals at the house after Mrs. Danford came?

A. She did for a short while.

Q. Did you hear any conversation at the table between Miss Ellis and Mrs. Danford in regard to your grandmother?

A. Well, Mrs. Danford apologized for grandma going about in a muumuu.

(End of Page 338 Official Transcript.)

Q. What did Mrs. Danford say?

A. "Excuse Aunt going around in her chemise."

Q. Muumuu?

A. Yes, Muumuu.

Q. Is that a white or colored dress?

A. Colored.

Q. Used by your grandmother when?

A. Washing and ironing.

Q. What did Miss Ellis say?

A. She didn't mind it at all, she thought it was perfectly correct, grandma should enjoy her own home.

Q. She said that to Mrs. Danford?

A. She did.

Q. How long did she stay there after she made that remark?
A. I think she took her meals—I don't remember if it was the day after or two days after that she stopped taking her luncheon with us.
Q. Did she take her luncheon there again while Mrs. Danford was there.
545 A. Not to my recollection.
Q. Did you hear any talk between Mrs. Danford and Miss Ellis said that Grandmother should do as she pleased in her own home?
A. I heard some remarks about——
Mr. BROWN: Her answer was that she thought her mother should enjoy her own home.

Mr. KINNEY:

Q. Was there any talk after that between Mrs. Danford and Miss Ellis?
No answer.
Q. I mean after Miss Ellis made that remark.
A. I think there was some more.
Q. Well what was it?
A. I think during the conversation there were some remarks passed about accents in different American places.
Q. What nationality was Miss Ellis?
A. She was an American.

(End of Page 339 Official Transcript.)

Mr. BROWN: I object. This has nothing to do with the case, what accents passed between Mrs. Danford and Miss Ellis.
The COURT: This whole case does not hinge on this little motion to strike out. The motion is granted. The testimony of the conversation of the witness in regard to American accents may be stricken from the record.
Mr. KINNEY: Then I note an exception.
The COURT: The ruling stands, however, that some remarks about American accent may be stricken out.

546 Mr. KINNEY:

Q. Will you please tell *you* where this conversation took place?
A. At the table.
Q. Who started it?
A. Mrs. Danford did.
Q. What did Mrs. Danford say?
A. It is about the different accents.
Q. Just what did she say?
A. Well, it is some Englishmen say Neither (nither) and some Americans say neither (neether) and she thought the English saying was better——

Mr. BROWN: (Int.) I object to the answer.
The COURT: The motion is granted.
Mr. KINNEY: I note an exception to your Honor's ruling.
The COURT: Exception allowed.

Mr. KINNEY:

Q. How long after Mrs. Danford had given this talk did Miss Ellis take her meals there?

A. I think she quit on the following day.

Mr. BROWN: That is a conclusion of the witness.

The COURT: The only thing to be ascertained is the fact.

The objection is sustained.

Mr. KINNEY:

Q. How soon did Miss Ellis cease taking her meals there after that talk?

A. I am not positive, but I think the following day or

(End of Page 340 Official Transcript.)

the day after.

547 Q. What visit was that that Miss Ellis was there the same time Mrs. Danford was?

A. It was this time Mrs. Danford came, when she came up with her husband.

The COURT:

Q. In February?

A. No, not in February.

Mr. KINNEY:

Q. Was it when she had the child?

A. It was after she had the child, I think it was in 1900.

Q. In the spring or fall or summer?

A. In the fall. It is sometime between October and November, 1900.

Q. Take the year—after Mrs. Danford left did your grandmother ever spend her evenings in the parlor?

A. Yes, sir.

Q. Who would be present?

A. On one occasion grandpa and grandma and the girls.

Q. How would he spend his evenings?

A. We have music and talking.

Q. Would your grandfather and grandmother talk together evenings?

A. Yes.

Q. In what way?

A. In one instance that I remember distinctly when he told grandma to sing a song. We were singing. Grandma said he was to sing it and he said, no he is too old for that, that she still had a voice and she was to stand up and sing it.

Q. Joking with each other?

548 A. Joking with each other.

Q. Do you remember when that was?

A. I just remember his saying that.

Q. But can't locate the time?

A. No.

Cross-examination.

Mr. Brown:

Q. How old were you when you came back just before Mrs. Danford was married?

(End of Page 341 Official Transcript.)

A. Thirteen or fourteen.
Q. How old were you when the suggestion came from Mrs. Danford as you say, after her marriage, when she came back there and suggested or asked you if it wouldn't be a nice thing for you to have Miss Barnard as a companion to teach you music and other things?
A. I think I was between thirteen and fourteen.
Q. Did you consider yourself at that time too old or above having a person to teach you music or anything?
A. No.
Q. Don't you think it was thoughtful and kind of your cousin to suggest such a thing to you?
A. I didn't think anything of it.
Q. At the time?
A. No.
Q. Do you think anything of it now?
A. Just at present I don't think I do.
Q. Between that time and until you came on the witness stand have you thought anything about it?
549 A. Between that time and this I don't think I have.
Q. What do you think of it now?
A. I rather like grandma's objection.
Q. Why?
A. There was so much trouble by wanting Miss Barnard there.
Q. What was the trouble caused by wanting Miss Barnard there?
A. It caused grandpa to strike grandma.
Q. And you saw that?
A. I did not see it but I saw the condition.
Q. How did you know it caused grandpa striking grandma if you have sworn that the suggestion was only made by Mrs. Danford to yourself?
A. She suggested it to me first, then in the morning I heard grandma and grandpa disputing about it.

(End of Page 342 Official Transcript.)

Q. If she suggested it to you first, how did your grandfather and grandmother become acquainted with the suggestion?
A. Probably she may have suggested it to grandpa.
Q. I am asking you for the fact.
A. I know she suggested it to me.
Q. Do you know from your own knowledge whether she suggested that to anybody else but you?
A. I don't — anything about that.
Q. But it seems to me when you make that observation, that you wish to impress upon the jury that you do.

A. I have nothing to do with the jury.

550 Mr. Brown objects to the answer.

Argument between counsel.

The COURT: The jury must not regard these statements made by counsel in the heat of the trial such as this or in the heat of any trial in weighing the evidence in this case in the slightest particular; counsel are not under oath, are not sworn as witnesses, not examined as witnesses. Their *ex parte* statements are not to be considered by you as evidence in arriving at a verdict.

(Reporter reads last question.)

Mr. BROWN: I withdraw the last question.

Mr. BROWN:

Q. As a matter of fact, Miss Notley, Miss Barnard was not installed as companion or teacher of music for you or your sister?

A. No, she wasn't.

Q. During the time you went there previous to Miss Mullinger's wedding where did you and your sister and your brother Johnny live, in the cottage with your parents or in the main house?

A. Previous to her wedding?

Q. Yes.

A. When we returned from school we lived in the cottage.

(End of Page 343 Official Transcript.)

Q. All the time?

A. Until after she is married.

Q. Where did you live when you came from Hilo?

A. In the cottage part of the time and part of the time in the main house.

551 Q. How long previous from the time you came from Hilo and the time of the marriage of Miss Mullinger, how long had you and your sister lived in the main house over which Mrs. Danford had charge at that time?

A. I don't remember.

Q. Was it one week?

A. It may have been some months.

Q. Was it some months?

A. It was more than a week.

Q. Was it some months?

A. It was more than a week.

Q. Was it some months?

A. Probably two or three months.

Q. Why couldn't you have answered that without this evasion? Did you hear the evidence of your mother yesterday when she swore on the stand that you never lived down there and lived in the cottage the whole of the time?

A. I don't remember that.

Q. If she swore to that, was that true or not?

No answer.

Mr. KINNEY: I submit the witness is not called upon to draw any conclusions.

Mr. BROWN:

Q. I withdraw that and say: Which is correct, the statement now made by you that you were there some months, or the one made by your mother that you were never there at all?

Mr. KINNEY: That assumes what the witness has not conceded or does not remember, what her mother said. She never stated what her mother said.

Mr. BROWN:

Q. Well, I leave the witness there. Was Johnny living in the house too?

(End of Page 344 Official Transcript.)

552 A. Not to my recollection.

Q. Then it is only yourself and your sister?

A. That is the way I remember it.

Q. Is it not possible for you to say whether or not — was living with you folks; you cannot state it?

A. No.

Q. Your memory is a perfect blank with regard to that?

A. I don't remember my brother staying in the main house with us.

Q. Therefore your memory is a perfect blank as to that fact?

A. Yes, sir.

Q. Do you know whether or not Mrs. Danford at any time taught your brother Johnny at the time you have said—during any of the times you said that she taught yourself and your sister?

A. She may have taught him.

Q. You don't know whether she did or not?

A. Not to my recollection.

Q. But you have a distinct recollection she taught you and your sister?

A. She gave us a few lessons.

Q. How many?

A. I could not tell.

Q. Was it one?

A. One lesson only?

Q. Yes.

A. Well, she gave me more than that. In a day do you mean?

Q. You know better than that, Miss Notley.

553 A. Well, she gave me several lessons in a day, but different ones.

Q. How many lessons did she give you—when she did give you lessons, how long was it during the day; what time did you commence, what time did you end?

A. From nine to twelve.

Q. And about how long did that last?

A. A short time.

Q. Was it a month?

A. I don't think so.

(End of Page 345 Official Transcript.)

Q. But you said a little while ago it was several months.
A. I stated in staying in the house.
Q. Was it before you went to school to Mr. Callendar or to Miss Bryant that this teaching of Miss Mullinger was?
A. It was after we went to school to Mr. Callendar.
Q. Then it was after Mr. Callendar left to go to England that she had this schooling of yourself?
A. Yes.
Q. And you don't recollect that she taught your brother Johnny —on that your memory is a perfect blank?
A. A perfect blank.
Q. And you have no recollection whether he was in the school room from nine to twelve during any of the time when you and your sister were being taught by Miss Mullinger?
A. I don't remember.
554 Q. And that you swear positively you haven't the slightest recollection on that subject?
A. I will swear that I don't remember.
Q. You are posit-ve of that? That your memory has no recollection of that?
A. I will swear.
Q. Was Willy Notley there?
A. I think he was there.
Q. Was he being taught?
A. I think he was taking lessons.
Q. From Miss Mullinger?
A. She was giving him lessons as she did us.
Q. Where was Johnny?
A. I don't know.
Q. Was he in Hamakua at the time?
A. I think he was.
Q. Was he living on the premises?
A. Yes.
Q. How is it you can recollect as to yourself, your sister and your brother Willy and cannot recollect as to Johnny?
A. I don't recollect because Johnny had lessons from papa at that time.

(End of Page 346 Official Transcript.)

Q. At the time Miss Mullinger was teaching you there was your father living there at that time?
A. Yes, I think he was in Paauilo.
Q. All the time?
A. Not all the time.
Q. Wasn't he attending to his business in Honakaa surveying, and up Mauka at the coffee plantation?
555 A. I don't remember that.
Q. What was the nature of the instruction that Mrs. Danford gave you and your sister and your brother Willy? You can answer that when you come back.

Recess here taken at 12 M. until 1:30 this afternoon.
The Court duly admonishes the jury not to speak of the case.

(End of Page 347 Official Transcript.)

TUESDAY, *January* 27, 1903—1:30 p. m.

Calling of the Jury Waived.

Continuation of cross-examination of Miss V. M. K. NOTLEY.

Reporter reads the last question asked before adjournment at 12 m.

Q. What was the nature of the instruction that Mrs. Danford gave you and your sister and your brother Willie?

A. She gave us Scripture lessons; read Scripture and gave us a little arithmetic.

Q. Geography?

A. No. I don't remember that.

Q. History?

A. I don't remember that.

Q. But you do remember Scripture?

A. Yes, I remember that.

Q. Why is it the Scripture lessons made such an impression on your memory?

556 A. We had joined a Scripture Union in Paauilo. There was little Scripture union cards.

Q. That is the reason you recollect so well she gave you Scripture lessons and a little arithmetic?

A. Yes, I remember that.

Q. Any grammar?

A. Not to my recollection.

Q. Or history?

A. Not to my recollection.

Q. Spelling?

A. I don't remember.

Q. Music?

A. She taught me a little in music.

Q. When you say a little, how long was it, during all the time you were there, three or four months?

A. No answer.

Q. How many lessons did she give you in music?

A. Just gave me enough to know what "C," "D," "F," "G" was.

Q. What is C, D, F, G in music?

A. Notes on the piano.

Q. Did you have any poetry?

A. I don't remember.

(End of Page 360 Official Transcript.)

Q. Any reading of any kind or description?

A. She used to read to us.

Q. But she did not teach you reading?

A. I don't remember.

Q. Calisthenics?

A. I don't remember that either.

557 Q. Do you know who paid for the education of your going to school to Mr. Callendar or Miss Ellis.

A. I knew from Miss Ellis.

Q. Who was it?
A. My grandfather.
Q. Was it a fact that the whole of your education while—after you had come back to Paauilo before Mrs. Danford was married, your support and maintenance up to the time of your grandfather's death was paid by him?
A. I don't know about that.
Q. You don't know anything at all about it?
A. No.
Q. Who gave you your clothes?
A. My father and mother did.
Q. You know your grandfather did not support and maintain you from 1897 or from the time you came to school before Mrs. Danford was married up to his death?
A. From 1897?
Q. From the time you came there up to the time of your grandfather's death?
A. I can't say about 1897.
Q. Can you say about any subsequent time?
A. From 1899 I can say.
Q. 1899, 1891 and 1892, do you know he paid for your support and maintenance?
A. I was in the house, and he gave me my food and clothes.
Q. Didn't your grandfather support and maintain you during that time?
A. I had clothes given by my father and mother.
Q. Who paid for your food?
558 A. Grandpa did.
Q. And all the servants of the house, etc., were paid by him?
A. I suppose so.

(End of Page 361 Official Transcript.)

Q. Did you live in the cottage there or the main house all this time after 1898?
A. In the main house.
Q. Where was your father and mother from 1898 until the death of your grandfather?
A. They were in Honolu'u.
Q. Did they supply you during that time with money and clothing from Honolulu?
A. They used to send us clothes from Honolulu; I don't remember about the money.
Q. Did your grandfather give you money?
A. He didn't give it himself but grandma used to give it.
Q. It came from him?
A. I don't know where grandma got the money; it may have come from some other place.
Q. Do you know whether or not if grandma had money of her own?
A. I don't know.

Q. In relation to your testimony on your direct examination as to the trouble, did you say that your grandmother rushed down and pulled all the buttons off your grandfather's vest, did you mean to convey on that examination that your grandfather and Mrs. Danford was starting on a trip to Kawaihae on the day that scene happened?

559 A. They were going to Honolulu.

Q. On that day?

A. On that day?

Q. Is it not a fact they were going to Honokaa to visit Mr. Weight?

A. Not to my recollection.

Q. Is it not a fact on that very day Miss Mullinger, then Mrs. Danford, after the trouble between Mr. Notley and his wife only went to Honokaa and came back to the house and left there that night, and left next day on the steamer for Honolulu?

A. Not to my recollection.

Q. Will you swear positively that she did not return on the evening of that day on which you have described the scene between your grandmother and grandfather?

A. I know she went away.

(End of Page 362 Official Transcript.)

Q. Will you swear she did not return home in the afternoon or evening that you said this *evening* occurred?

A. She did not return.

Q. Will you swear positively she did not return to the house that night and sleep and leave the next morning?

A. To my recollection she went away and did not come back.

Q. Will *she* swear she did positively?

A. Yes, positively.

Q. Will you swear positively that she did not leave the house on the next morning, and that you kissed her good-bye, and

560 furnished her with leis, and that she went to Honokaa and took the steamer to Honolulu with Mrs. Woods' sister?

A. I don't remember her coming to the house.

Q. Then she left the next morning for Honokaa and went to Honolulu accompanied by Mrs. Woods' sister?

A. I know she left on the Honokaa steamer.

Q. Do you know when she left, if it was that day this scene happened or another time?

A. All I remember is this happened and she left, and left on the Honokaa steamer.

Q. Was it one and the same day?

A. To my recollection it was the same day.

Q. But you are not positive?

A. I will swear that is my recollection.

Q. You will swear that is the best of your recollection?

A. Yes.

Q. But you will not make a positive statement?

A. I have sworn it is my recollection.

Q. If a person sworn before, if Mrs. Danford should come on the stand and swear that the facts were after this she returned to the house and slept that night and left the next day for the steamer from Honokaa, would her positive statement have any influence with you as to your recollection?

A. I know she left that day; I don't remember of her coming back?

(End of Page 333 Official Transcript.)

Q. Answer my question—yes or no?

(Reporter reads last question.)

Q. I repeat the question; can you not answer that question? Or, will you not—you will not or you cannot?

561 A. I replied on my recollection that she did not return.

Q. You stated here in your direct examination, and after your aunt, or after your cousin made a suggestion to you, or suggested to you that she thought it would be a nice thing for you to have Miss Barnard there, that the next thing you spoke about you had some conversation with your grandmother; what was the language used by your grandmother when you mentioned something about wahine haole to her grandmother—when she mentioned something about wahine haole?

A. My grandmother objected to it.

Q. What was the language your grandmother stated about wahine haole?

A. I did not say I had a conversation with my grandmother.

Q. Didn't you testify in your direct examination that you had a talk with your grandmother afterwards, and that she told you in Hawaiian, when it was mentioned about Miss Barnard coming there, that she "had enough of wahine haole"?—

A. No answer.

Q. What was the conversation between your grandmother and grandfather, in Hawaiian or English?

A. Hawaiian; my grandmother said (speaking in Hawaiian) she didn't want a white lady there; she had enough of them.

Q. That is, she didn't want any white ladies in the house because she had enough of them?

A. My translation is she didn't want a white lady there, she had enough of them. (Speaking in Hawaiian.)

562 Q. Was she speaking then of Miss Barnard or collectively of white people as a class?

A. Directly of Miss Barnard.

(End of Page 364 Official Transcript.)

Q. After February, 1899, were there many white ladies came to your house and called on your grandmother and you?

A. Yes.

Q. Do you know any instance where a white lady came there

and was driven off the premises by your grandmother? Mrs. Dr. Greenfield?

A. I don't remember her being driven off; I didn't see that—I heard of it.

Q. You didn't see anything that happened?

A. No.

Q. Are not Dr. and Mrs. Greenfield old residents of the district of Hamakua, and were they not great friends of your grandfather?

A. Grandmother objected; there had been some trouble before.

Q. Answer my question please.

A. They were friends.

Q. Hadn't Dr. Greenfield—was Dr. Greenfield during the time that you were in charge of the main house, and after Mrs. Danford had left and was married, was Dr. Greenfield in the habit of visiting your grandfather and spending the night there at any time?

A. He used to come in; his daughter was married, living in Paauilo.

Q. I am asking you about the Doctor.

563 A. He didn't come there often and spend the evening at our house; he came there to lunch several times.

Q. You were not present at the time of any trouble between your grandmother and Mrs. Greenfield?

A. Not to my recollection.

Q. Have you any recollection upon it at all that such a thing happened?

A. Well, I heard that such a thing happened.

Q. When this thing happened, where were you—on the Island of Hawaii or the Island of Oahu?

A. On the Island of Hawaii, then in Paauilo.

Q. Where did this thing happen?

A. I suppose in my grandfather's house; I was told.

(End of Page 365 Official Transcript.)

Q. On the day when it happened were you on those premises or convenient?

A. I was up at Mrs. Podmore's.

Q. How long on that day were you absent from the house?

A. I don't remember.

Q. Do you remember anything at all that happened on that day?

A. I was out playing with the Podmore children.

Q. You were; of that age you went out playing with the children?

A. Well, I was up at their place.

Q. I say you were so young that you were out playing with the children?

A. I was 13 or 14 years.

564 Q. Is that one of the reasons you cannot recollect about facts and circumstances that were asked you?

A. I say I heard.

Q. Is that one of the reasons that you cannot recollect, on account of your age?

Mr. KINNEY: I think this is not proper. Well, about her not recollecting about her brother Johnny being taught by Mrs. Danford.

The COURT: I think this is unfair to the witness.

Mr. BROWN: I ask it now, then.

The COURT:

Q. State whether because of your youth you don't remember that your brother Johnny was taught by Miss Mullinger?

A. I don't remember Miss Mullinger teaching Johnny, Johnny was too far advanced for her.

Mr. BROWN: My question is the reason that she made whether he—well, I pass that. Is that the reason, your age of 13 years, that you cannot now state whether Mrs. Danford returned to the house and slept that night and left the next day after the happening of the event between your grandmother and your grandfather where you sewed the buttons on the vest?

A. I don't remember the returning. I don't think that has anything to do with my age or not.

(End of Page 366 Official Transcript.)

Mr. BROWN: I wish the Court would tell the young lady to answer that.

565 The COURT:

Q. Do you think, Miss Notley, that you don't recollect that occurrence because of the fact you were so young the matter had not made a fixed impression on you?

A. I was not young. I don't know how to answer that.

Mr. BROWN:

Q. Was the lawn tennis court and the playing of lawn tennis kept on by yourself and your sister after Mrs. Danford went away from there?

A. Some time after.

Q. Was it or was it not?

A. Some time after.

Q. Was it stopped?

A. No.

Q. Then it began on up to the time of your grandfather's death?

A. Whenever we felt like playing lawn tennis, we did.

Q. How many days during the month or week did you feel like having lawn tennis?

A. We were supposed to have it once a week.

Q. So you played lawn tennis once a week?

A. We kept that up for a time.

Q. For how long?

A. I don't remember how long, but I know we stopped for about two months and had the tennis court re-fixed.

Q. And after the tennis court was re-fixed you still kept on?
A. Yes, off and on.
Q. Who went there?
A. Mr. and Mrs. Lidgate, the community in general.
Q. Who were the community in general?
A. The bookkeeper and his wife, Mr. and Mrs. Lenhart
566 Q. Who else?
A. Mr. and Mrs. Madden, Mr. Mike Madden and the Horners.
Q. And the Greenfields?
A. The Greenfields.
Q. After the trouble between your grandfather and your grandmother, and after Mrs. Danford left there and came home, was it not a fact that for four, or five or six months there was no lawn tennis

(End of Page 367 Official Transcript.)

playing at the premises—on those premises, by reason of the objections made by your grandmother?
A. I don't remember that.
Q. Do you recollect Mr. Frank Stanley coming to visit there?
A. Yes, I recollect.
Q. Did he remain on the premises?
A. He did.
Q. Did he go up to the table?
A. Yes.
Q. Did your grandmother go to the table?
A. No.

Re-direct examination.

Mr. KINNEY:

Q. Do you know the Podmore family?
A. Yes, I did.
Q. Did they call and visit at your home after Mrs. Danford left?
A. Yes.
Q. You speak of the Lenharts and the Maddens?
567 A. Yes.
Q. Did the Lidgates call and visit at your home after Mrs. Danford left?
A. Yes, they came and called.
Q. Made social calls?
A. Yes.
Q. Did the Richards call?
A. Yes.
Q. Do you know—is there a Horner family——

Mr. STANLEY: I object. He has no right to lead the witness as to who called; I object to the question as being leading.
The COURT: I don't think it is proper.

Mr. KINNEY:

Q. Who else that you think of?
A. Mr. and Mrs. Madden, Mr. Mike Madden, the Greenfield boys,

Mr. and Mrs. Tompkins, Mr. and Mrs. John McClellan, Mrs. Colin McClellan of Papaloa, Mr. and Mrs. Walker of Paauilo.

Q. Well, say in the last year before your grandfather's death in 1901, did the former residents of the district continue calling?

A. Yes.

(End of Page 368 Official Transcript.)

Q. Speaking about the Greenfields, you say they were old residents?

A. Well, I have always heard; they had been there since I remember.

Q. Do you know whether or not your grandmother had given entertainments times without number before this instance?

568 Mr. STANLEY: I object to the question as being leading.

The COURT: Objection sustained.

Mr. KINNEY:

Q. What was the relationship between Mrs. Greenfield and the young man, Frank Greenfield?

A. Mrs. Greenfield is Frank Greenfield's mother.

Q. Do you know of your own knowledge of any trouble between your mother and Mrs. Greenfield, what the trouble was, or only from what you have heard?

A. I heard something.

Q. But you did not see or know of it yourself?

A. No.

Recross-examination.

Mr. BROWN:

Q. Can you tell whether or not all these different people that lived in Hamakua, that you have named, visited at the homestead after Mrs. Danford went down to Honolulu when she was married, visited at your father's place previous to her marriage and while she was living there; that is, of your own knowledge?

A. Some of them I remember called there.

Q. That is, the entertainments and the social pleasantries were just the same during Mrs. Danford's residence before she was married as they were after she was married and while you were there?

A. I could not say to that, because it was probably a little different to what she had it.

Q. The entertainment, or what?

A. Probably she had a dinner party and had people we didn't have.

569 Q. Do you mean different people?

A. Yes.

(End of Page 369 Official Transcript.)

Q. That is, your associates were different from Mrs. Danford's?

A. Didn't you ask if the social entertainments were the same?

Q. Whether or not the general social gatherings, as they have

them in the country, were not they continued after Mrs. Danford left, after she married, as they were before?

A. I suppose you might say yes to that; they are not all the same.

Mr. KINNEY:

Q. Did you folks give dinner parties?

A. I remember once we didn't have——

Q. (Int.) The dinner parties that used to be given as before?

A. We just had young people to ours, at least girls more of our age.

Q. Those parties that you have entertained, you have named them?

A. Yes, sir.

Q. They are out of their swaddling clothes—grown-up people?

A. Yes, sir; they are grown-up people.

(End of Page 370 Official Transcript.)

Miss LILY NOTLEY, sworn on behalf of the contestants, testified as follows:

570 Mr. KINNEY:

Q. You are Keala Notley's sister, are you?

A. I am.

Q. And a daughter of Charles Notley?

A. I am.

Q. Do you remember the February, 1899, visit of Mrs. Danford to Paauilo?

A. I do.

Q. Do you remember the occasion when she left?

A. I do.

Q. It was suggested here that Mrs. Danford left and then came back to spend the night and went away in the morning; is that so?

A. No.

Q. Where were you when she did leave?

A. I said "Good-bye" to her on the drive.

Q. Did you see anything of the trouble—of the attempt of your grandmother to hold her husband back?

A. I did.

Q. What did you see?

A. I came out as grandma held Mrs. Danford back and pushed Mrs. Danford down; at least she pushed her aside and Mrs. Danford fell down and claimed grandma knocked her over.

Q. What did your grandma say?

A. She said, "I don't want you to go; you stay home; you're old, I don't want you to go. Mrs. Danford is married and has a husband of her own to take care of her."

Q. In what way was your grandmother talking?

A. Partly crying and partly angry.

Q. How about your grandfather's vest?

571 A. Well, I saw her clinging on him; she knocked him down in a chair, and was holding him so that he could not get up and go, so I walked away with Mrs. Danford.

Q. What was your grandfather saying?
A. He did not say anything at the time only that he

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could not go.
Q. Do you remember what he said to your grandmother?
A. I didn't get in the time that he was talking to her.
Q. Where was your grandfather when your grandmother took hold of him?
A. Just stepping off the veranda onto the walk, going up to the drive, when she pushed him back. Mrs. Danford tried to get them (apart), but she pushed her aside.
Q. What did you grandfather do when your grandmother pushed him?
A. Fell into a chair.
Q. Who was present at the time you were speaking of?
A. My brother Johnny.
Q. What did you see next of your grandfather after you accompanied Mrs. Danford to the carriage?
A. I did not see him again until lunch time.
Q. Did he say anything about it?
A. No.
Q. What kind of man was your grandfather in reference to his strength and build?
A. Well, he was a well, strong man.
Q. Even in his old age?
A. Even in his old age.
572 Q. Did you see your grandmother when she was holding on to him?
A. He tried to push her aside, but could not.
Q. He didn't strike her or anything?
A. He could not move his arms.
Q. Did you see them when they appeared there at the corner?
A. No, I came down at the time I heard my grandmother calling out for help.
Q. You accompanied Mrs. Danford where?
A. Into the bedroom.
Q. And from there where?
A. Onto the drive; from there she left in the carriage.
Q. Who was the driver?
A. A Japanese man, Nakamoto. She didn't come back

(End of Page 372 Official Transcript.)

at all.
Q. Are you positive of it?
A. Yes.
Q. Do you remember any difficulty between your grandfather and grandmother shortly after Mrs. Danford left on that occasion?
A. I know the one about Miss Barnard.
Q. I mean after Mrs. Danford left on the day as you have de-

scribed, after that do you remember any difficulty between your grandfather and grandmother?

No answer.

Q. Did you at any time see any bruises on your grandmother's face?

A. That is the time about the Miss Barnard trouble, that is the only time I saw bruises.

573 Q. She was out in public with the bruise on her face?

A. Yes.

Q. Do you remember when it was after Mrs. Danford's marriage, this talk came up about Miss Barnard coming to the house to live at the home?

A. I don't.

Q. You don't remember when it began?

A. No.

Q. Do you remember hearing anybody talking about it?

A. At first I knew there was a dispute between my grandmother and grandfather.

Q. Where was Mrs. Danford then when you first heard the dispute between your grandmother and grandfather?

A. I think she was in Honolulu, but it was after she came up.

Q. It was after she came up?

A. Yes.

Q. Came up where?

A. Up after her marriage in February.

Q. Then, she was at Paauilo at that time?

A. Who?

Q. Mrs. Danford.

A. No, it was after that I heard about it. First of all the quarrel caused me to inquire; then I found out what

(End of Page 373 Official Transcript.)

it was.

Q. Where was Mrs. Danford then?

A. She had left.

Q. She had come up and left when you knew about it?

A. Yes.

574 Q. What year was it you came from Hilo to live in Paauilo?

A. 1895.

Q. And Mrs. Danford was married when?

A. 1898.

Q. And during that time how much of the time did you live in the main house with her?

No answer.

Q. Did you live all the time in the main house or in the cottage?

A. Most of the time in the cottage; after her marriage, mostly in the main house; in fact altogether in the main house.

Q. But did you before the marriage at times live in the main house?

A. Yes.

Q. Give us a description of the routine of Mrs. Danford's daily life at the house; when did she usually arise?

A. Any time she felt like it; if the breakfast bell rang and she was in bed, she would get up then.

Mr. DAVIS: Is that evidence on the question of undue influence? I object. The evidence is immaterial and inadmissible and remote as to time.

The COURT: I think the Court has ruled upon that objection before. I see no reason at the present time for changing that ruling. The objection is overruled.

Mr. KINNEY:

Q. Who did she have her breakfast with?

A. When—with my sister and Miss Barnard and herself. After a while my brother would sometimes come down; then we
575 used to have visitors at the house. The Greenfields used to come to breakfast, in fact, to all their

(End of Page 374 Official Transcript.)

meals when she was there.

Q. What would be done during the forenoon—what would she generally do in the forenoon?

A. Nothing; read or something of the sort; she didn't have to do any work.

Q. After lunch what would she do?

A. Go out calling, riding or driving.

Q. What would she do in the evening?

A. Get dressed for dinner, then afterwards receive some callers, and see some friends near by afterwards.

Q. Were you present at the death with your grandfather?

A. I was.

Q. Did he speak in his last moments?

A. He was unconscious when he died.

Q. Did you hear him say anything?

A. Before he lost consciousness he called for my grandmother.

Q. What were the words he used?

A. He said, "Mele, Mele." That is quite a while before he died.

Q. One hour? Two or three hours?

A. Perhaps half an hour, I think.

Q. Before he died?

A. Yes.

Q. Do you know while Mrs. Danford was away after her marriage, whether she kept up correspondence with your grandfather?

576 A. I do.

Q. Do you know what became of the correspondence?

A. They were all torn up.

Q. Did you see that?

A. Yes.

Q. Did he treat his other correspondents that way?

A. Not to my recollection.

Mr. DAVIS: I submit to your Honor, I move to strike that out. There has not been a word here that there was

(End of Page 375 Official Transcript.)

anything contained in any of this correspondence affecting the disposition of this man's property, of any influence used in the correspondence.

The COURT: I have forgotten, but I want to be consistent in this ruling. (Stenographer looks over his notes, but cannot find the ruling of the court in regard to the matter.)

Mr. DAVIS: Then I withdraw the objection.

Mr. KINNEY:

Q. Do you remember an evening in February in 1899 that Mr. Madden and another lady came up—Mr. Madden and a lady came up to your home on a Saturday evening? And the Scotchman was there that worked for your father at the coffee farm?

A. I do.

Q. Where were you—do you remember where Mr. Madden and your father were that evening?

A. My father was in the office. Mr. Madden and the rest of them, I think, had gone to see him. I guess they were in the office.

577 Q. You don't know where they were?

A. No.

Q. But you knew your father was in the office?

A. Yes.

Q. How did you come to know that?

A. I came down and found that father was in the office. The Scotchman told me he was in the office.

Q. Where was the Scotchman then?

A. On the walk, standing there.

Q. Where was Mrs. Danford?

A. By the parlor door.

Q. Doing what?

A. Standing in a listening attitude.

Q. Looking in what direction?

A. Towards the office door.

Q. And you say that your father was in there?

A. I heard his voice in there.

(End of Page 376 Official Transcript.)

Q. What did you do?

A. Nothing; Mrs. Danford walked towards me and I walked towards her, and we went to the window and we stayed there talking.

Q. This matter of schooling—do you remember when you first went to school who you went to upon your arrival in Paauilo from Hilo?

A. I do.

Q. Who was it?

A. Mr. Callendar.

Q. About what time did you go to school to him?

A. In the latter part of 1895 and the early part of 1896.

578 Q. About what time in 1896?

A. Mr. Callendar left for England then.

Q. Who was the next teacher?

A. Miss Bryant.
Q. Did you go at once from Mr. Callendar to Miss Bryant?
A. No.
Q. What was done?
A. Mrs. Danford didn't think it was right for us to go to school.
Q. How long did she teach you?
A. About a week or two; that is my recollection.
Q. What did the teaching consist of as you remember?
A. Scripture and a little arithmetic.
Q. Anything else that you think of?
A. No.
Q. Did she stay in the room with you?
A. No. Just simply said, "Do this," left us in the room and went out.
Q. Was it your desire to be kept from trained teachers?
A. No.
Q. How soon did you get back to your trained teachers?
A. As soon as she stopped teaching us.

Cross-examination.

Mr. DAVIS:

Q. How old are you, Miss Notley?
A. Seventeen.
Q. How old were you when Mrs. Danford began to teach you?

(End of Page 377 Official Transcript.)

579 A. I think I was ten years old.
Q. Are you sure that she only taught you for a week?
A. That is to the best of my recollection.
Q. Well, you can remember other incidents. Could it not have been two weeks?
A. I didn't say only a week; I said a week or two.
Q. That is it? One or two weeks? I have it down one week.
A. I don't know.
Q. It might have been a month?
A. It was not a month.
Q. Will you swear positively it was not three weeks.
A. No.
Q. Was it two weeks?
A. It might have been.
Q. What time would you go to school?
A. Nine o'clock and stay there until twelve, then go to lunch and then to play.
Q. Would you lunch in the main house?
A. Yes, lunch in the main house.
Q. Did you sleep in the main house?
A. Yes.
Q. She was teaching you, you said, in the main house?
A. Yes. I didn't see my mother every day; she was not there.
Q. She wasn't there at all?

A. Not to my recollection
Q. Will you swear she wasn't?
A. I will swear to a certain time, she was not there; she arrived during the last day Mrs. Danford taught me.
Q. Why did you say not to your recollection?
A. Because she was not there before to my knowledge.
580 Q. Where was she?
A. She was in Hilo here.
Q. Did you tell her Mrs. Danford had been teaching you?
A. I never told her anything about it.
Q. Never told your mother?
A. No.

(End of Page 378 Official Transcript.)

Q. Never said anything about it?
A. No.
Q. How long did you go to the other school after your mother arrived?
A. As soon as Mrs. Danford gave up teaching I went to the other school to Miss Bryant.
Q. Was there any conversation took place between you and your mother about going to Miss Bryant's school?
A. She simply told me to go to Miss Bryant.
Q. Then you did have a conversation with her about it?
A. I did.
Q. And you mean to tell me when the conversation took place about going—did you ask your mother about going to Miss Bryant's school?
A. I didn't. I didn't say anything of the sort.
Q. What did you say?
A. I said she simply told me to go to Miss Bryant's.
Q. Who told you?
A. My mother.
Q. And you mean to say that any conversation—that you had no conversation about whom you had been going to school to when this talk about the school was going on? Will you swear to that?
581 A. I will.
Q. How far away when Mr. Madden came there and was in the office with your father—how far away was Mrs. Danford?
A. As far as that door is from me. (Pointing.)
Q. Was the door open?
A. I don't know; I didn't go and look. I was in the parlor.
Q. You were not paying much attention to what was going on?
A. Certainly not.
Q. You didn't observe anyone very closely?
A. Only Mrs. Danford.
Q. Why did you observe her closely?
A. Because she made me suspect something.

(End of Page 379 Official Transcript.)

Q. What about?
A. She has never stood in the doorway like that before when there was talking going on in the parlor; my attention was directed towards her.
Q. Show this jury how she stood in the doorway.
A. In this way. (Showing.)
Q. How long did she stand there?
A. She might have been standing an hour and a half (minute and a half?).
Q. Was she there a minute?
A. She walked away when I went in.
Q. You won't swear that she had been there five minutes?
A. I cannot say.
582 Q. And she didn't remain there?
A. She stayed long enough for me to see what she was up to. She walked away when I went in. She had to.
Q. Why?
A. Because I called her away. I said, "Emma, I want to speak to you." I said nothing particular besides that.
Q. That is all that you said?
A. That is all.
Q. What made you suspicious?
A. Because I knew what was going on. The Scotchman told me.
Q. Did he tell you there was some trouble? Could you hear what was going on in the office?
A. If you stood by the parlor door you could.
Q. Could she?
A. When I called her away, no.
Q. But at the time that she stood there could she hear?
A. She must have been able to hear.
Q. How do you know?
A. Because the voices were loud enough.
Q. Could you know?
A. If I stayed there I could.
Q. Did you hear anything these people said?
A. I didn't go near the door.

(End of Page 380 Official Transcript.)

Q. How do you know you could hear?
A. Because I tried it.
Q. With the same people in there?
A. No.
583 Q. When did you try it?
A. When my grandmother and grandfather had disputes.
Q. Were they talking as loud as when they had disputes?
No answer.
Q. Why did you stand in that particular door and try it?
A. Because I wanted to see.
Q. What object did you have?

A. I had my own object. I wanted to know what my grandparents were talking about.

Q. And you had stood in the doorway to ascertain that?

A. I did.

Q. You could go closer and hear?

A. And cause more suspicion.

Q. If you stood in the door where she was you could be almost seen from the office?

A. If the door was open.

Q. Therefore it would cause some suspicion if you went closer?

A. No.

Q. Well, you could be seen openly from the office?

A. Not if the door was closed.

Q. You don't know if she had the door closed, I mean Mrs. Danford?

A. I don't know if she had the door closed.

Q. Why did you talk about the door being closed?

A. I did not say it was closed or open.

Q. You said that she could be—could not be seen if the door was closed.

584 A. You asked me if it would not cause suspicion if you went out.

Q. When you saw Mrs. Danford there she didn't make any attempt to hide?

A. She made an attempt to walk to me.

(End of Page 381 Official Transcript.)

Q. Did she make any attempt to hide as if she was sneaking in any way?

A. No, because there was nothing to hide behind.

Q. The night that the trouble was between your grandfather and grandmother, when she was holding on to his vest, who drove Mrs. Danford away from the house in the night?

A. It was not the night time.

Q. Well, in the day time?

A. The Jap did.

Q. Did he come back in the night alone?

A. Yes, alone.

Q. What time did Mrs. Danford come back?

A. She didn't come back at all.

Q. Was that the last time she visited that house?

A. That is the last time I saw her during that time. She didn't come back that night. She came on the next visit when she had her little baby.

Q. You will swear she didn't go over to Watt's (Weight's) and return that night?

A. I will.

Q. You were at the Mist's in Honolulu, were you not?

A. Yes.

Q. You were being taught there, taking music lessons, etc.?

585 A. I was boarding and lodging there, but was not taught there. I was taught at the High School.

Q. Mrs. Danford was also down to the Mist's, was she not?
A. I heard she was.
Q. Don't you know as a matter of fact she was—that your grandfather sent her there?
A. I heard she was sent there.
Q. You and your sister were sent there and boarded as she was, weren't you?
A. Yes.
Q. Didn't you know that your grandfather sent Mrs. Danford there?
A. I heard that he sent her there.

(End of Page 382 Official Transcript.)

Q. How long afterwards when you were sent there?
A. Mrs. Danford is older than I am.
Q. How long after she was there that you were sent there?
A. I was sent there when ten years old.
Q. Was your sister with you?
A. She was.
Q. How long did you remain at the Mist's?
A. Near the whole year at school.
Q. Your grandfather paid your expenses?
A. I suppose so.
Q. Do you know—have you any doubts about it?
A. I was only told. I never saw them.
Q. Who told you?
A. My parents did.
586 Q. That your grandfather was paying your expenses?
A. Yes.
Q. At whose suggestion were you sent to the Mist's?
A. I think it was Mrs. Danford's.
Q. Didn't your grandfather tell you that?
A. He simply told us they were very nice people, and it was best for us to go there. I went there, and I suppose had the same opportunities as she had.

The COURT:

Q. Is that an educational institution—Mrs. Mist's?
A. No, she took in boarders and lodgers, and I went to the High School.

Mr. DAVIS:

Q. Give us the date for that. You say your grandfather destroyed one of Mrs. Danford's letters?
A. I saw her letters destroyed so often I can't remember.
Q. Can you give one date?
A. I cannot give you the date because I don't know.
Q. How many letters did you ever see him destroy?
A. I never counted.

Q. How did you know it was Mrs. Danford's letters he

(End of Page 383 Official Transcript.)

destroyed on these occasions?
A. I knew her handwriting.
Q. Where would he destroy these letters?
A. The man would bring them from his office.
Q. Where would your grandfather destroy these letters?
A. I never watched him; I don't know.
587 Q. Was it in his office?
A. I don't know.
Q. Did you ever see him tear any of her letters?
A. No.
Q. What do you mean by swearing that you saw him destroy her letters?
A. Because I knew he tore them.
Q. Did you see him do it?
A. I said no.
Q. Of your own personal observation you never saw him destroy her letters?
A. I said no before.
Q. Why do you swear he destroyed them?
A. Because I knew he destroyed them?
Q. You didn't see him?
A. No.
Q. Explain that if you can to the jury.
A. Because no one took my grandfather's letters. He told us he never allowed anyone to take his letters but himself.
Q. You swear he destroyed his letters?
A. Yes.
Q. You swear that you never saw your grandfather destroy one of his letters?
A. Yes.
Q. Did you see him destroy them?
A. No, because he told me himself he never allowed people to meddle with his letters; that is as much as to tell me—it is as much——
Q. (Int.) You put two and two together and come to the conclusion he destroyed the letters. Is that it?
588 A. No.
Q. Did you watch your grandfather's mail to see if any letters arrived from Mrs. Danford?
A. No.
Q. Were you present at any time when he opened Mrs. Danford's letters?
A. No.

(End of Page 384 Official Transcript.)

Q. Did he ever read Mrs. Danford's letters to you?
A. Never read them to us, but he told us about them.

Q. Did you ever overhaul your grandfather's private papers to see if any letters were among them from Mrs. Danford?
A. No, I never did it.

Redirect examination.

Mr. KINNEY:

Q. What made you say that the letters were burned?
A. Because I saw them burned.
Q. In fragments?
A. Yes.
Q. How frequently did you see the fragments of burned letters?
A. Every time the waste basket was brought from grandfather's office into the kitchen and emptied there I always saw her letters amongst them, the pieces.

Mr. DAVIS:

Q. Did you examine the fragments of the waste basket and put them together at any time?
A. I didn't do it.
Q. Did anybody else do it?
589 A. I heard they did.
Q. Who?

Mr. KINNEY: I submit that is hearsay and not admissible.

Mr. DAVIS:

Q. I withdraw that question. Did anyone do it in your presence?
A. No.
Q. You never did it?
A. No.
Q. Wasn't the waste basket full of torn letters and papers?
A. No.
Q. What was done with the torn papers when they were brought out?
A. They were left in the basket.
Q. You will swear to this jury that the waste basket was not half full of torn papers when it was brought out?
A. It may have been filled with torn rubbish, but not letters.

(End of Page 385 Official Transcript.)

Q. What was done with them after they were brought out?
A. Put in the fire.
Q. Did you take particular pains to overhaul that waste basket to see what the fragments consisted of?
A. No, but I took particular notice of them in the waste box.

(End of Page 386 Official Transcript.)

590 Mr. JOHN NOTLEY, sworn on behalf of the contestants, testified as follows:

Mr. KINNEY:

Q. Your name is John Notley, Charles Notley's oldest living son?
A. Yes, sir.
Q. How old are you?
A. Twenty.
Q. Do you remember the occasion when Mrs. Danford in February of 1899 left the home?
A. I do.
Q. Did you see her going out?
A. I saw her going out.
Q. Who was with her, if anyone?
A. Herself.
Q. Where was your grandfather?
A. Sitting in a chair on the front veranda.
Q. What happened?
A. Grandma telling him to stop.
Q. Did you see that—grandma telling him to stop?
A. Yes.
Q. Which veranda? (Mr. Kinney here shows witness photograph, Exhibit 21.)
A. This one. (Pointing.) That is my grandfather in the chair.
Q. Your grandmother was talking to him? What was she saying?
A. That she didn't want him to go with Mrs. Danford, and that she had recently been married and had a husband of her own and a home of her own, and if she wanted anbody to see her to her home it was the duty of her husband to come and take her to Honolulu.

591 Q. What baggage did your grandfather have?
A. He had a Japanese valise and a traveling trunk.
Q. What did your grandmother say?
A. After grandmother pushing him in the chair and telling him he was not to go, he said he was not going.
Q. Did he treat her harshly?
A. No, he didn't.
Q. How soon afterwards did he go to Honolulu?

(End of Page 387 Official Transcript.)

A. About two months after that.
Q. What, if anything, was Mrs. Danford doing at the time? Who was there; who got there first as between—that is, you say your grandfather and grandmother were there—who got there first, Mrs. Danford, you or who?
A. When I got there Mrs. Danford was there also.
Q. Anybody else at the time?
A. Well, it was a little while after that that one of my sisters came down; I cannot say which one of them.
Q. What was said by Mrs. Danford?
A. I was standing on the makai side of the railing as you left the main house, and grandma got between to push grandpa in a chair,

and it happened she shoved Mrs. Danford and Mrs. Danford was pushed back.

Q. What, if anything, did Mrs. Danford say at the time?

A. She seemed to be mad to me.

Q. What, if anything, did she say to your grandmother?

A. "Who is this woman that I should listen to her?" I heard that with my own ears.

592 Q. Did you ever go to Kauai with Mrs. Danford and see her home?

A. Yes, I went to Kauai with Mrs. Danford.

Q. How did you come to go?

A. Grandpa told me that he had intended to go to Kauai to spend Christmas, and he asked me to go with her to take care of Mrs. Danford's baby, as there was no other to go.

Q. Did you go?

A. I went.

Q. And took care of the baby?

A. Yes, took care of the baby as best I could.

Q. Where was that from—to go from where?

A. From Paauilo to Kauai.

(End of Page 388 Official Transcript.)

Q. Did your grandfather go to Kauai?

A. No, he stopped at Honolulu.

Q. Why?

A. He was feeling a little unwell, and he had a swelling in his leg.

Q. On account of illness he could not go?

A. He could not go, and I went with Mrs. Danford.

Q. How long did you stop there?

A. I stayed about three weeks.

Q. Where did you spend your Christmas?

A. At Mrs. Danford's.

Q. After Christmas did you or Mrs. Danford get mail from Honolulu?

A. We got mail.

593 Q. How do you know she got her mail?

A. We opened the letters in the dining room.

Q. Did she make any remarks from what she read in her letters?

A. She opened a letter and said it was from uncle—that is, my grandfather; that he had a Christmas dinner at Maria's, and that there was my father, my mother, my uncle and my aunt with himself present at the table.

Q. At Aunt Maria's?

A. At Aunt Maria's, yes.

Cross-examination.

Mr. DAVIS:

Q. She told you pretty nearly all that was in that letter?

A. Just told me what that was.

Q. Told you pretty nearly all that was in that letter?

A. I don't know if there was more in the letter or not; I didn't ask her.

Q. Your grandfather wrote her a full account of this visit and who was present?

A. He was down there also——

Q. (Int.) I didn't ask you that. I asked you if the account in the letter was not telling about the Christmas dinner he had with his children and his wife?

A. I suppose that is all there was to it.

(End of Page 389 Official Transcript.)

Q. But he wrote a full account of the dinner?

A. I didn't ask Mrs. Danford if it was a full account; he wrote an account of it, that is all I know.

Q. And told who was present at the dinner?

594 A. And told who was present.

Q. What else did she say to you about it?

A. That is all.

Q. Did he say they had a good time?

A. She didn't tell me that.

Q. Did Mrs. Danford use you nicely on the trip?

A. She was a very sea-sick lady.

Q. I mean after you got there.

A. She did.

Q. Was she kind to you?

A. Yes, she was kind.

Q. You were on friendly terms with her at that time?

A. With Mrs. Danford? I never said I was unfriendly or friendly.

Q. I asked you if you were on friendly terms with her at that time?

A. Supposed to be.

Q. Were you as a matter of fact, or did you simply hate her?

A. I never hated her for anything; I paid all the respects I showed to her.

Q. You answered me, "I was supposed to be;" what did you mean by that?

A. Friendly with her.

Q. But you said when I asked if you were on friendly terms with her at that time, you said, "I was supposed to be." What do you mean by that?

A. That I didn't show any unfriendly feeling.

Q. Why did you put in the words, "supposed to be"?

A. Because I didn't show unfriendly feelings towards her.

595 Q. Was there something back of that?

A. There was nothing back of that.

(End of Page 390 Official Transcript.)

Q. You were either on friendly or unfriendly terms with her?

A. When I went down there I was friendly with her.

Q. Why did you use the words, "supposed to be"?
A. When you said friendly, I didn't know whether you said friendly or unfriendly.
Q. Is that the only explanation why you put the words, "supposed to be"?
A. Yes.
Q. You or your grandfather didn't go to Honolulu until two months after the trouble when your grandmother had him by the vest. Were you present and heard the other witnesses testify in this case this afternoon?
A. Yes, this afternoon.
Q. Did you hear any of them testify to this, "Who is this woman you should listen to?" Did any of the other witnesses testify to that?
A. No.
Q. How long ago was that?
A. February.
Q. What year?
A. 1899.
Q. That is nearly four years ago?
A. Yes, sir.
Q. And you say that you can remember exactly what Mrs. Danford said four years ago on an occasion like that?
596 A. I can.
Q. What were the exact words Mrs. Danford used—repeat them please?
A. "Who is this woman that you should listen to?" addressing that to my grandfather.
Q. You got the word "that" added now?
No answer.
Q. On your direct examination you testified, "Who is this woman you should listen to?" Now you have got "The woman *that* you should listen to?"
(Reporter reads by request of attorneys, question and answer relating to these expressions.)
Q. You say that you can remember the exact words?

(End of Page 391 Official Transcript.)

A. I repeated it already.
Q. You repeat that you can remember the exact words she said four years ago? Repeat that again, please.
A. "Who is this woman that you should listen to?"
Q. Then you didn't say, "Who is this woman that you should listen to her?"
A. I didn't use the word "her."
Q. And you didn't use the pronoun "I"?
A. I didn't say that, about the pronoun "her" the first statement; I ended with the word "to."
Q. You didn't use "I" then?
A. I didn't use "I."
Q. Then the stenographer's notes are not correct? Can you remember what you did say on your direct examination?

A. "Who is this woman that you should listen to?" That is what I said.

597 Q. You didn't use "I"?

A. I didn't use "I."

Q. Those were the same words exactly used four years ago?

A. That is what I have in my mind.

Q. Then the stenographer's notes are not correct? The "I" was not in it?

A. The "I" was not in it.

Q. Why was that so vividly stamped upon your memory, these exact words she used four years ago? Give us the reason.

A. It is impressed on my mind.

Q. Why?

A. After being a witness to where the row was, to think of Mrs. Danford addressing grandfather and I, his grandson, standing right there; to think such an insult should be passed on grandfather.

Q. It was something that you never would forget?

A. Never would forget.

Q. But you went to Kauai with her afterwards?

A. To pay respects——

Q. (Int.) You did go, didn't you?

A. I did go, but not from my own will——

(End of Page 392 Official Transcript.)

Q. (Int.) Wait a minute: you went?

A. But not from my own will.

Q. Why did you say that? Does not the memory of that insult, as you call it, account for you using the words "that you were supposed to be on friendly terms with her? When I asked you

598 if you were on friendly terms with her you said you were supposed to be, and it was that what you had in mind?

A. I forgave all about that.

Q. And forgave the words?

A. Not the words.

Q. Did you forgive what you considered as an insult? It passed out of your memory?

A. For forgiveness; but I took her back under orders from my grandfather. I forgave her for that, but that is still on my mind; I cannot get it out.

Q. That is why you said "I was supposed to be on friendly terms"?

A. Yes.

Q. Then the reason that you gave me is not a correct one, before on this examination, is it? When I asked you whether you used the words "I was supposed to be," then the reason you gave me before was not the correct reason?

No answer.

Q. It must be one way or the other.

A. Well, to my mind I never showed any unfriendly feeling.

Q. I asked you if the reason you gave me before for using these words, "I was supposed to be," is not the correct reason—is it? Answer the question.

A. "I was supposed to be" is not correct. This last statement is the correct one.

Q. But the reason you gave me for using the words in your answer, "I was supposed to be," is not the correct

(End of Page 393 Official Transcript.)

reason?

599 A. Is not the correct reason.

Q. Why did you give that reason when you knew you were under oath when I asked you?

A. Because I didn't under- the question before that.

Q. That was always a rankling in your breast, a feeling of disrespect and of unfriendliness because of the statement you say you heard her make concerning your grandmother?

A. Well, from the time she spoke of that——

Q. Answer the question—was there?

Mr. KINNEY: Objects.

The COURT: Answer the question if it is susceptible of an answer, yes or no. You may make any explanation you may have to make afterwards.

(Reporter reads last question.)

A. At that time, yes.

Q. And at the time you went to Kauai was still there?

A. No.

Q. Is it entirely gone?

A. My ill feeling towards Mrs. Danford?

Q. Yes.

A. Yes, it is gone.

Q. When did it cease to exist?

A. When I obeyed the orders of my grandfather about taking her to Kauai, as he was not able to go. Up to this time I had unfriendly feelings with her.

Q. Didn't it vanish after you got in company with her and went down there; that is the time it vanished, because she treated you nicely and kindly?

600 A. Of course I paid my respects to my grandfather.

Q. Because she treated you kindly, wasn't it?

(End of Page 394 Official Transcript.)

A. I stayed about five days there. I didn't stay there the whole three weeks.

Q. Was it because she treated you kindly that that feeling disappeared?

A. She never treated me before I left Kauai.

Q. I didn't ask you that. Was that it, because of her treatment of you that unfriendly feeling disappeared?

A. Yes.

Q. You have heard the witnesses of Mr. Notley testify this afternoon and today and yesterday, some of the witnesses, that Mr. Not-

ley, when Mrs. Danford was in Honolulu, passed your aunt's residence, and when in company with Mrs. Danford he never spoke to them, nor did he visit them except slightly and only for a minute or two?

A. I heard that.

Q. Hadn't you thought it was strange that he should write to Mrs. Danford an account of that dinner and that he was present?

No answer.

Q. If he was doing that, don't you think it was strange he would write to Mrs. Danford about this dinner? Wouldn't it strike you as strange if that was true?

A. Yes, it would be strange.

Mr. KINNEY: I will introduce in evidence some bills wherein Charles Notley paid for the schooling of his children. That is to meet the positive statement of Mr. Lidgate under oath that
601 Mr. Notley, Sr., gave all the support to the children. I ask that they be made exhibits.

Mr. STANLEY: For the sake of saving our rights, we'll submit without argument that they are objectionable on the ground they are immaterial and irrelevant to

(End of Page 395 Official Transcript.)

the issues before the court.

The COURT: I don't remember what Mr. Lidgate's testimony was on the subject, but if there was any such testimony, in my mind the motion should be denied. If there is no such testimony I will entertain the motion to strike out.

Mr. KINNEY: I would like to introduce some of the old account books of Charles Notley and Sons in evidence in proof of recognition of Mr. Notley of certain business relations with his son, introducing them simply to show that receipts were taken for payments of money in the name of Charles Notley and Sons; that correspondence was carried on in the name of Charles Notley & Sons, and that the time book was kept in the name of Charles Notley & Sons.

Mr. DAVIS: I object on the ground it is not immaterial, and such evidence is calculated to prejudice the jury. This is not a suit in Equity for an accounting.

The COURT: It has been admitted over counsel's objection that the sons did assist their father in the acquisition of a portion of this money; at one time they aided and assisted him in his business interests here in Hawaii; but the books are not proof of anything, are they?

602 Mr. KINNEY: The books are put in evidence to show that business was conducted under the name of Charles Notley & Sons, and business was done along those lines.

The COURT: I do not consider that books of any firm, etc., are evidence of any kind, except perhaps that such books were kept; that is not in issue here.

Mr. KINNEY: I except to your Honor's ruling, and make the following——

(End of Page 396 Official Transcript.)

The COURT: I will rule that you put them in.

Mr. KINNEY: I now offer in evidence receipt book of Charles Notley & Sons for the year 1886.

Mr. DAVIS: I object to that, if your Honor please, on the ground that it is immaterial and irrelevant.

The COURT: The objection is sustained.

Mr. KINNEY: Note an exception.

Mr. KINNEY: I offer in evidence receipt book of Charles Notley & Sons for the year 1895.

The COURT: The same objection, ruling, exception.

Mr. KINNEY: I offer in evidence — of Charles Notley & Sons for the year 1884.

The COURT: Same ruling, exception and allowance.

Mr. KINNEY: I offer in evidence the pay roll book, containing the pay roll of Charles Notley & Sons, for the year 1883, 1884, and 1885.

603 The COURT: The same ruling, exception and allowance.

Mr. KINNEY: I offer in evidence the press copy book of C. Notley & Sons for the year 1886 for the same purpose.

The COURT: The same ruling, exception and allowance.

Mr. KINNEY: I offer in evidence press copy book of Charles Notley & Sons covering correspondence for the year 1885.

The COURT: Same ruling, exception and allowance.

Mr. KINNEY: I offer in evidence press copy book Charles Notley & Sons for the year 1883.

The COURT: Same ruling, exception and allowance.

The COURT: The clerk will mark the offered exhibits for the purpose of identification.

(End of Page 397 Official Transcript.)

Mr. CHARLES NOTLEY, recalled on behalf of contestants, testified as follows:

Mr. KINNEY:

Q. Who paid those bills, Mr. Notley?
A. I paid those bills.
Q. With your money?
A. With my own money.
Q. These bills you just handed to me?
A. Yes, these bills I paid them myself.

604 Cross-examination.

Mr. BROWN:

Q. Is it not a fact your father refused to pay these bills because your daughters were taken from the Mist's place and put in the priory there without his knowledge or consent?

Mr. KINNEY: I object to that as not cross-examination.

The COURT: The objection is sustained.

Mr. BROWN:

Q. Before you paid these bills, yours, did you interview your father?

Mr. KINNEY: I object to that question, whether it is an interview with his grandfather or father; the question amounts to whether he paid these bills.

The COURT: This witness is only called to identify certain bills. My view of the matter is there can be no cross-examination of this witness at all.

Mr. BROWN: I will take an exception to that ruling that there is no cross-examination of this witness at all.

The COURT: Except on the fact of the payment of these bills.

Mr. BROWN:

Q. Do you know whether or not these bills were demanded payment from any other person than yourself before you paid them?

(End of Page 398 Official Transcript.)

Mr. KINNEY: I object to that. Mr. Lidgate on oath said he swears here he paid these bills.

The COURT: The objection is sustained.

605 Mr. STANLEY: I note an exception to your Honor's ruling.

The COURT: Exception allowed.

Mr. BROWN:

Q. Why did you pay these bills?

Mr. KINNEY: I object to that. He says he paid them.

The COURT: The objection is sustained as to why he paid these bills.

Mr. BROWN:

Q. How many demands were made on you for the payment of these bills before you paid them?

Mr. KINNEY objects.

The COURT: Objection sustained.

Mr. STANLEY: I note an exception to your Honor.

The COURT: Exception allowed.

Mr. BROWN: Under the ruling of the Court there is no cross-examination of the witness as to the payment of these bills and the reasons he paid them.

The COURT: There is, but not along the lines you have gone.

Mr. KINNEY: I close.

The COURT: You have not offered these to the Court in evidence.

Mr. KINNEY: I offer now these bills.

Mr. BROWN: We except to the introduction of these in evidence.

606 Mr. KINNEY: I offer in evidence this series of bills collectively, being marked Exhibit 24. They have been submitted to counsel.

Mr. STANLEY: We object to the introduction. They are inadmissible in evidence as being immaterial to the issue.

(End of Page 399 Official Transcript.)

The COURT: Objection overruled. Exception allowed.

Mr. KINNEY: I close.

Mr. DAVIS: I wish to make the following motion, which I will have typewritten and submit to your Honor in the record.

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

In the Appeal of Charles Notley *et al.* from the Order of Probate in the Matter of the Last Will and Testament of Charles Notley, Sr., Deceased.

Contestants having closed, now comes Cecil Brown and Anthony Lidgate, proponents of the last will and testament of the late Charles Notley, Sr., deceased, and move the Court here, with the jury empanelled to try this cause on the appeal of Charles Notley, Jr., David Notley, Maria Hughes, and William Notley, from the Order of Probate made by the Circuit Court of the Fourth
607 Circuit on the 19th day of September, 1902, and upon the issue of fact filed in this Court on the 21st day of January, 1903, to be directed and instructed to find a verdict for the proponents of said will. This motion is based upon the records in this cause and upon the grounds stated and filed with the stenographer upon the filing of this motion.

(Signed) ANTHONY LIDGATE,
CECIL BROWN,
By their Attorneys, GEORGE A. DAVIS,
W. L. STANLEY, AND
CECIL BROWN.

Dated at Hilo, Jan. 27, 1903.

(End of Page 400 Official Transcript.)

Mr. DAVIS: Now, if your Honor pleases, I move the grounds of the motion are.

The COURT: The motion having been read, the jury will be excused.

Jury excused by the Court after being duly admonished not to speak of the case.

Mr. DAVIS: The grounds of this motion, I will state briefly. The motion is based upon the records in this suit and the evidence taken upon this trial. There is no evidence to support the contestant's allegation contained in the Order, nor to support the issues
608 which were framed in the said Order, to-wit, that the will and codicils were made, executed and published under undue influence; nor is there evidence to support the allegation contained in the contestants' motion and appeal.

2. There is no evidence that there was any undue influence used by Mrs. Danford or any other person upon or over the testator,

either before or at the time of the execution of his last will and testament which has been admitted to probate.

3. That the evidence sustains the position of the proponents that the making and execution of the last will and testament of Charles Notley, Sr., which has been admitted to probate, was the spontaneous, free and voluntary act of the testator, and that at the time he made it he was of sound and disposing mind, memory and understanding. That the statutory requirements with reference to formality of the will have been fully satisfied, and that the will upon its face and the proof adduced as to its making and execution supports the admission of the will to probate, and therefore the will was properly admitted to probate. There is absolutely no evidence before this

(End of Page 401 Official Transcript.)

Court to submit to this jury upon the issues framed, and the evidence adduced by the proponents upon this appeal, as to the making and execution of this will, is uncontradicted, and it is the duty of the Court to instruct the jury to find a verdict for the proponents.

(End of Page 402 Official Transcript.)

609 WEDNESDAY, *January 27th*, 1903—9 a. m.

Jury and Parties all present.

The Court here duly directed the jury to bring in a verdict for proponents, in accordance with proponents' motion filed herein.

Mr. KINNEY: Your Honor will permit me an exception to the ruling of the Court, and all findings of law and fact contained therein.

The COURT: Exception allowed.

(End of Page 403 Official Transcript.)

Mr. BROWN: May it please the Court, your Honor having granted the motion made by the proponents for the will to direct a verdict, requesting that the Court request the jury to bring in a verdict for the proponents of the will, I now move that the Court so instruct the jury and ask them to bring in their verdict according to the form submitted.

The COURT: The motion is granted.

Mr. KINNEY: What is the motion of counsel?

The COURT: For the contestants requesting the Court to instruct the jury in accordance with the form of the verdict submitted.

Mr. STANLEY: Proponents, your Honor.

The COURT: Proponents.

610 Mr. BROWN: The proponents' motion that the jury be now directed to render a verdict in the form now submitted to the Court.

The COURT: And the motion is granted.

Mr. KINNEY: Your Honor, I take exception to the granting of said motion on the ground that the granting of the motion is con-

trary to the law and the evidence, and not justified by the evidence adduced in behalf of the contestants to the will. The law and the evidence and the weight of evidence, and not justified by the evidence adduced by the contestants herein.

The COURT: Exception allowed.

The COURT: Gentlemen of the Jury, at this stage in this appeal the motion of the proponents requesting the Court to direct you Gentlemen of the Jury to find a verdict for the proponents being granted, it is now my duty to so instruct you, and I do now instruct you, to find for the proponents in this matter, and direct that your verdict shall be in the following form:

(End of Page 404 Official Transcript.)

In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

Judge W. J. Robinson, Presiding.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

We, the jury in the above entitled cause, find for the proponents and to the first question of fact submitted to us, answer and
611 say that the will and codicils dated respectively, May 18, 1899, August 2, 1900, and April 11, 1902, are the last will and codicils of Charles Notley, deceased. And in answer to the second question of fact submitted: answer, say and find that said will and codicils were not executed by, under or by virtue of undue influence exercised by Emma Danford at the time of the execution and publishing by said Charles Notley, deceased, of said will and codicils thereto.

(Signed) ——— ———, *Foreman.*

Hilo, Hawaii, Territory of Hawaii, January 28th, 1903.

The COURT: Gentlemen, you may render your verdict, either without leaving your seats, or you may retire to deliberate upon the verdict submitted; but in either case, you may select one of your number as foreman, and the verdict agreed in by you all and signed by you all shall constitute your verdict. Your verdict, of course, must be unanimous.

(End of Page 405 Official Transcript.)

Mr. KINNEY: The contestants especially except to the instructions given *to* the Court *by* the jury and particularly to the instruction of the Court that the jury—in substance, that the jury must find a verdict in the form read by your Honor to the jury, and contained in the form of instructions now being handed by the Court to the jury.

The COURT: The exceptions are allowed.

You may retire if you so desire and choose your foreman, gentlemen.

(The jury immediately choose their foreman and give the following verdict from their seats.)

612 The COURT: Have you agreed upon your verdict, gentlemen?

A. Yes, sir; we have.

The Clerk read the verdict of the jury as follows:

In the Circuit Court of the Fourth Circuit, Territory of Hawaii.

Judge W. J. Robinson, Presiding.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

We, the jury in the above entitled cause, find for the proponents, and to the first question of fact submitted to us, answer and say: That the will and codicils dated respectively, May the 18th, 1899, August the 2d, 1900, and April 11, 1902, are the last will and codicils of Charles Notley, deceased. And in answer to the second question of fact submitted, answer, say and find that said will and codicils were not executed by, under, or by virtue of undue influence exercised by Emma Danford at the time of the execution and publishing by said Charles Notley, deceased, of said will and codicils thereto.

(End of Page 406 Official Transcript.)

(Signed) A. E. SUTTON, *Foreman.*

Hilo, Hawaii, Territory of Hawaii, January the 28th, 1903.

The COURT: Gentlemen, is that your verdict?

A. It is.

Mr. KINNEY: In behalf of the contestants, I except to
613 the verdict as contrary to the law and evidence and the weight of evidence, and give notice of motion to move for a new trial on the ground that said verdict is contrary to the law and the evidence and the weight of evidence.

The Court here discharges the jury from further service in this cause.

Mr. BROWN: I understand that the Court *pro forma* overrules the motion for a new trial.

Mr. KINNEY: I have written out my exceptions to the verdict. I would like to have it allowed in writing by the (Court).

Mr. BROWN: All right.

The Court signs the motion handed to him by Mr. Kinney.

Mr. KINNEY: I will just file that, if the Court please. May it please the Court, having paid the costs of the Court and to accrue by cash bond and the payment of coin, and having filed a motion for a new trial, I hereby ask leave of the Court to present the same.

The COURT: Leave is granted.

Mr. Kinney reads the motion as follows:

(End of Page 407 Official Transcript.)

614 In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, January Term, A. D. 1903.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

Motion for a New Trial.

Mary K. Notley, Charles Notley, Maria Hughes, William Notley and David F. Notley, contestants herein, hereby move for a new trial herein, and that the verdict rendered herein be set aside on the following grounds, *i. e.:*

First. That said verdict is contrary to the law and the evidence and the weight of evidence.

Second. For errors of law committed by the Trial Judge in refusing to admit evidence that should have been admitted in behalf of contentants, and as erroneously admitting evidence that should have been excluded, and for errors in instructing the jury, and duly excepted to.

This motion is based upon all records and papers herein, and the stenographer's notes of evidence and proceedings herein.

Dated January 28, A. D. 1903.

KINNEY, McCLANAHAN & BIGELOW,
Attorneys for Contestants.

Endorsed "In the Circuit Court of the Fourth Judicial Circuit. In the matter of the Will of Charles Notley. Motion for a new trial. Filed January 28, 1903. Daniel Porter, Clerk."

615 The COURT: The motion will be denied. It is understood, is it not, that counsel for proponents waive any right with regard to time of hearing of motion claimed under statute or any rule of court?

(End of Page 408 Official Transcript.)

Mr. BROWN: It is understood now that the motion is overruled so that they can put in their Bill of Exceptions.

The COURT: So this record will show no objection of counsel as to time, etc. It is waived?

Mr. BROWN: Certainly. It is all waived.

Mr. KINNEY: Contestants' counsel hereby excepts to the refusal of the presiding judge to grant his motion for a new trial, filed herein.

The COURT: Which exception is allowed. The exception in writing, of course, would cure any defect in the record.

Mr. KINNEY: I would ask that the Court allow forty days from this date in which to file and perfect my appeal to the Supreme Court and Bill of Exceptions.

(No objection.)

The COURT: It is so ordered. The request of counsel for forty days within which to prepare the Bill of Exceptions.

Mr. KINNEY: I will ask further it would be agreed by counsel

that that Bill of Exceptions can be allowed by the presiding judge in Honolulu without coming up to Hilo.

Mr. BROWN: Yes, to be sure.

(End of Page 409 Official Transcript.)

616 HONOLULU, *March* 2, 1903.

I hereby certify that the foregoing typewritten matter is a full and true transcript, from my shorthand notes, of the testimony taken and proceedings had in the above entitled matter at the place and date therein mentioned.

P. MAURICE McMAHON,
Official Stenographer.

(End of Page 410 Official Transcript.)

617 (CONTESTANTS' EXHIBIT 1.)

(Referred to on page 18 ante.)

This agreement made and entered into this 25th day of August, 1899, by and between Charles Notley of Hamakua, in the Island of Hawaii, of the first part, and Frank Andrade of Honolulu, in the Island of Oahu, of the second part:

Witnesseth: that the party of the first part for and in consideration of the sum of One Dollar to him paid by the said party of the second part, does hereby give and grant to the said party of the second part for the term of Ninety (90) days from the date hereof, the right and option to purchase from said party of the first part, for the sum of one million dollars ($1,000,000.00) in United States Gold coin, all of his right, title and interest in and to the Ahupuaa of Kukaiau situate in the District of Hamakua, Island of Hawaii, subject however to all existing leases and agreements concerning said land. Also his shares of stock in the capital stock of the Hamakua Mill Co. Ltd., a corporation organized and existing under the laws of the Hawaiian Islands, and consisting of 1500 shares and doing business in said District of Hamakua.

The party of the first part does not undertake to procure a release of dower from his wife, to the Ahupuaa of Kukaiau, and no reduction of the purchase price herein named is to be made or demanded if a release of dower is not obtained to said Ahupuaa.

CHAS. NOTLEY.
FRANK ANDRADE.

In the presence of
CECIL BROWN.

618 (CONTESTANTS' EXHIBIT 2.)

(Referred to on page 51 ante.)

PAAUILO HAMAKUA, *Nov.* 14*th*, 1883.

MY DEAR DAUGHTER:

I have just received yours of the 11 inst. and right glad I am to hear that you are well and like the place your Mother got home all right but she took off all her clothes and swam four gulches to do so. I have a very bad cold and cough all the rest are quite well little Johnny is first rate and almost walk alone. we are haveing very fine weather here just now we began grinding last tuesday on my rattoons juce stand at 9 makeing five tons to the acre if all my cane turn out like this I shall have about 1800 tons this grinding.

When I was in Honolulu I bought a lot of furniture in the lot there was two cane nurse chares I put your name on one and sent it to Ah. Fangs to be shiped to you the first chance the other one Emma has here in this house don't you fret the Chinemen are not going to gave you any thing. did you not receive your *Docter's Bill Paid*. I have kissed Johnney a dozen times for you and so has Mama. We all Join in Love to you Baby and Tomey. I remain your loveing Father

CHAS. NOTLEY.

619 (CONTESTANTS' EXHIBIT 3.)

(Referred to on page 51 ante.)

PAAUILO HAMAKUA,
HAWAII, *Oct.* 31*th*, 1884.

MY DEAR DAUGHTER:

I have received your very kind letter of the 28 inst. and am glad to hear that you and Baby are quite well. I am not quite well myself yet I had a large four headed boil on my back boon right over my Kidnees it was what is caled a carbincal at the same time I had the tooth ake with the newralige and a lot of small boils and my stomac was very much out of order all those things at one time has gave me a prity good shakeing how someever I am nearly all right again now thank God all the rest of our family are quite well Johne is a very fine fellow now Baby is the finest Baby I ever saw I have gave her the name of Victoria Maria Notley what do you think of it will do very well wont it.

Mama send her best love and we all join with our love to you and Baby.

I remain your loveing Father

CHAS. NOTLEY.

620 (CONTESTANTS' EXHIBIT 4.)

(Referred to on page 52 ante.)

PAAUILO HAMAKUA,
HAWAII, *July* 10*th*, 1884.

MY DEAR DAUGHTER:

I have received your loveing letter of the 7 inst. and am glad to hear that you and Baby are quite well and that the little thing is so good and geting to be a little chatter box Kiss her 100 times for me. Johny is all right taring round here and Baby is first rate and very pritty in fact we are all of us quite well Williams helth is very good.

the weather is very dry no rain to speak of since you left.

We all send our love to you and Baby.

I remain your loveing Father

CHAS. NOTLEY.

621 (CONTESTANTS' EXHIBIT 5.)

(Referred to on page 52 ante.)

PAAUILO HAMAKUA,
HAWAII, *Oct.* 23*th*, '84.

MY DEAR DAUGHTER:

I received your very kind and loveing letter of the 6 of this month and right glad I am to hear that you and Baby are quite well Oh my dear child how I have suffered since I wrote you last it was simpley fearfull but thank God I am nearly all right again now that is the reasion I have not wrote you before this for I simpley could not do it. All the rest of our family are quite well Charlie and Emma don't know what name to gave their beautifull little Baby yet cannot you sujust some nice name for it. Mama is stout and harty we all join *join* in love to you and Baby.

I remain your loveing Father

CHAS. NOTLEY.

622 (CONTESTANTS' EXHIBIT 6.)

(Referred to on page 53 ante.)

PAAUILO HAMAKUA,
HAWAII, *Sept.* 18*th*, 1884.

MY DEAR DAUGHTER:

I arrived home safely the Kinau put me on board of one of the schoners leying at Kukaiau So I slept on board all night and got home on thursday morning rather sick and have been sick ever since with rather a bad billious fever but am nearley all right again

now. All the rest of us are quite well William look first rate Just now all the swoling gon out of his face and hands

We all hope that you and Baby are quite well poor little dear how she clung to my neck when biding you good by I shall not forget it very soon.

Mrs. Ranton is in Honolulu stoping with old Mrs. Domenis old Mrs. Dominess and would like you to call on her as she cannot go to see you.

We are haveing a grate deal of rain for this time of year.

We all join in love to you and Baby.

I remain your loving Father

CHAS. NOTLEY.

623 (CONTESTANTS' EXHIBIT 7.)

(Referred to on page 53 ante.)

Shoeland's Cottage.

EDGEWARE, MIDDLESEX, *August 13th*, 1885.

MY DEAR DAUGHTER:

God bless you and babe I received your very kind and loving letter last night with you and Babes likeness Oh my dear how my sister your ant cried for joy at sight of you and Babe. She said the moment she saw you it struck right throw her the same as though you was her own daughter ah my dear you look very beautiful and babe to you have no idea how all my people would like to see you in purson Grandfather is quite well and so are all your uncles and ants and cusins. I do a good deal of coughing very now and again other wise I am well and fat in fact in first rate helth. It is not very plesent going about sight seeing all alone England is a very beautifull country at this time of year ah my dear how I do long to get back again to my dear Children and Island home. If I had received answers to my letters from Charle and Mr. Keyworth Mamma and David as I have from you I should start home in a few days their letters all went at the same time as yours your couson that want to come home with me know as much I can tell her about what sort of a place she is going to I have told her and her parents there in all my letters home I have always told them the trouth but she is crazey to come with me one time her Mother did not like her to go
624 but the little thing cried so that at last her parents consented for her to go so I have done all I can for her and them my love to you dear Child God bless you Kiss babe for me my love to Tomey

I remain your loving Father

CHAS. NOTLEY.

625 (CONTESTANTS' EXHIBIT 8.)

(Referred to on page 54 ante.)

Shoeland's Cottage.

EDGEWARE, MIDDLESEX, *July 14th*, 1885.

MY DEAR DAUGHTER

I have received yours of June 13 and am glad to hear from you and that you and Babe are quite well only Babe has fell off a little in her foode I hope she is doing better now I am well in fact better than I have been for some years Grandfather is quite well all our relasions are quite well and would have like to have seen you very much I should have been proud to have had you with me but it was not to be. I can not write you all I have seen but will tel you when next we meet writeing is a bother to me you have no doubt received my other letter before this of the 1 of June with your cusons likeness She is a very nice girl and still hold out that she will go out with me and leave Father and Mother for ever I think perhaps they will all cry out at the last if not I shall bring her with me you have a lot of cusons here and all of them very pritty girls and women married and singal. I am very glad to hear that my old friend Smithies has got a job at last When I got home here it was very cold I went down near home and got off into a public house to have a drink and a rest and smoke there I set talking with a man for some time I got up to go away and biding the man good by found that it was one of my Brothers in fact it was Brother James that we have the likeness of My love to you my dear daughter and childe Kiss her for me gave my regards to all enquiring friends I remain your loveing Father

CHAS. NOTLEY.

626 (CONTESTANTS' EXHIBIT 9.)

(Referred to on page 54 ante.)

PAAUILO, HAMAKUA,
HAWAII, *June 18th*, 1890.

MY DEAR DAUGHTER:

Your very kind letter of the 12th inst is to hand. I am glad to hear you all are in good health, as I am happy to say all at home are the same. Charley came up by himself and took all his children and efects downs to Honolulu with him they have raised his salery some. Your poor Mother has been suffering very much for about three weeks during the time Charley was away but she is all right again now. I have had a fall over like what I used to have in Waimea years ago but was all right again in a very short time. I don't see any thing rong in what Mr. Chapin said to your husband an employer has a perfec right to say so and so used to do so and so any body might say such things without meaning any thing or ofence to the

party he is speaking to. I think your husband is a little too tuchy he himself often make such remarks, and for that matter so do you for instent in your letter you call my Niece Miss Mullinger and she is your first cousin and you ought to call her so when you are speaking to me of her or to any body else otherewise you show disrespect to me and do yourself no good in other peoples eyes.

Mr. Lidgate staid in the house only two or three days his arm is rather stiff yet. The Greenfields are all well as usuel. Mr. and Mrs. Podmore piereces daughter and soninlaw are rather nice people he is a little firey kind of a fellow quite joly and neighbourly.

627 I am glad to hear that you are sending Maria to school at last I think you have done a very wise thing for once at any rate. your Brother David has left the government employ and gon to work for Mr. Lucas which I aprove of very much as he will be able to larn something there.

We all join in love to yourself husband and family

I remain your loving Father

CHAS. NOTLEY

628 (CONTESTANTS' EXHIBIT 10.)

(Referred to on page 55 ante.)

PAAUILO, HAWAII. *Sept.* 21*st*, 1899.

MY DEAR SON:

Your welcome letter of the 13th inst is to hand Contents noted. I am glad to hear that you are in good health. But am sorry to hear that your Wife is still in poor health. I am as Dr. Oliver say in very good health All at home are also in good health with sister and family also Counsin baby and husband all are enjoying good health.

I don't know where you got your news from in regard to my offering all my property for one million dollars. I have never offered to sell any of my property to any body pleas tell me who toled you that lie

Your Brother have not written to me of seeing you. I don't have nothing to do with him for he has behaved to me like a broute

With love to yourself and Wife

I remain your loving Father

CHAS. NOTLEY.

629 (CONTESTANTS' EXHIBIT 11.)

(Referred to on page 55 ante.)

Mr. William Notley, Kalaupapa, Molokai.

(CONTESTANTS' EXHIBIT 12.)

(Referred to on page 56 ante.)

PAAUILO, HAWAII, *Sept. 7th*, 1898.

MY DEAR SON:

Your welcome letter of August 4 came safely to hand. I am glad to hear that yourself and Wife are well. All at home are also well. Charlie Wife and family are all well, he Charlie is working very hard just now and so is doing better than formley he has got about 40 acres of coffee planted which is doing well. We have had some very nice showery weather this year but just we are having rather dry weather

We all send our love to you and Wife. I remain your loving Father

CHAS. NOTLEY.

630 (CONTESTANTS' EXHIBIT 13.)

(Referred to on page 56 ante.)

Mr. William Notley, Kalaupapa, Molokai.

(Referred to on page 57 ante.)

(CONTESTANTS' EXHIBIT 14.)

PAAUILO, HAWAII, *May 16th*, 1901.

MY DEAR SON:

Your welcome letter of the 2th inst is to hand, I am glad to hear that yourself and Wife are well All at home are also well.

In selling your Kalo farm I hope you will get the amount of money for it that you have spent on it. if you do not you will have lost my money and not your own for you have to depened on me to make good what you have lost which is not fair to my other children Of course you being shut up were you are to keep you from want you have allways had more from me than any other of my Children

We are having very dry hot sunshiney weather dust every were

All at home join in love to yourself and Wife

I remain your loving Father

CHAS. NOTLEY.

631 (CONTESTANTS' EXHIBIT 15.)

(Referred to on page 57 ante.)

PAAUILO, HAWAII, *June 18th*, 1901.

MY DEAR SON:

Your welcome letter of the 30th ulto is to hand I am glad to hear that yourself and Wife are well. All at home are also well.

You speak of my help to you and your Kalo farming. What I want to know is whether you get your money back or not that you have laid out on your Kalo farm You must acknowleg that you have spent over $2000.00 per year eighter on Kalo farming or something els. *The money* I sent you the other, *I make you a present of it.* It is not your intruding my kindness at all but what you do with your money when you get it that is the idea.

52 days hot sun and strong winds but no rain cane dieing

With love to you both

I remain your loving Father

CHAS. NOTLEY

632 (CONTESTANTS' EXHIBIT 16.)

(Referred to on page 59 ante.)

HONOLULU, H. I., *July 25th*, 1895.

MY DEAR DAUGHTER:

Your welcome letter of the 26th inst. is to hand. I am glad to hear that yourself Tommey and children are all well. I have been sick for the last four days but am about all right again now. Emma and Miss Barnard came down this Kinau they came on board at Koholalele at the same time Mrs. Emma Notley and children landed there with all their luggage from Hilo Charlie it appears has worked himself out of his job also the good graces of the Government. So I suppose he is comeing home to his old Father for a while till something turn up. You write about Sam Woods as though I knew all about it but I don't what did he fall from and where did he fall and what kind of a fall was it did he brake any bones or not. I don't know who sam woods but suppoes he is a son of Mr JA, Woods of puuhue.

My love to yourself Tommey and children.

I remain your loving Father

CHAS. NOTLEY.

633 (CONTESTANTS' EXHIBIT 17.)

(Referred to on page 59 ante.)

Stamped $10.—

This indenture made this first day of May A. D. 1883, between Charles Notley and Sons of Hamakua, Hawaii, H. I., party of the

first part, and John M. Horner & Sons of the same place, party of the second part, Witnesseth.

That the said party of the first part for and in consideration of the covenants hereafter mentioned on the part of the party of the second part, their heirs, executors, administrators and assigns to be paid, kept and performed hath let unto the said party of the second part their heirs, executors, administrators and assigns. All that parcel of land situate in Hamakua, Hawaii, H. I., being eight hundred and forty acres more or less (the amount to be ascertained by actual survey) and being the makai portion of the Ahupuaa of Kukaiau, being that portion of the said land suitable for the cultivation of Sugar Cane and being bounded on the North by the Ocean, on the East by a deep Gulch, on the West by a deep Gulch and on the South by the northern line of a two hundred acre tract under contract of lease to be made in December A. D. 1883, between the said party of the first part and said party of the second part, together with all the appurtenances appertaining thereto.

To have and to hold the above described premises with all the appurtenances thereto belonging for and during the full term of twenty-five years from the first day of May A. D. 1883, re-
634 newable for a like term of twenty-five years at the option of the party of the second part at the expiration of this lease the said party of the second part yielding and paying rent at the rate of Five Dollars per acre per annum payable quarterly in advance during the continuance of the said term and the said party of the second part agrees to pay all taxes levied or assessed by the Hawaiian Government upon all growing crops, buildings or other improvements.

That in the event of this lease being given up at the termination of the first term of Twenty-five years all mills and buildings will be purchased by the party of the first part at a fair valuation.

That the party of the second part shall have the right to procure from any part of the said Ahupuaa of Kukaiau all timber required for building or fencing purposes without charge and also to cut fire wood upon any part of the said Ahupuaa outside of the boundary of this lease and the Two hundred Acre tract above mentioned at a charge of One Dollar per cord for all firewood so cut, and the free use of any water that may be found on any part of said land of Kukaiau or on any of the lands adjacent belonging to the party of the first part which said party of the first part are not using for the Hamakua Plantation.

That at the expiration of the said term of Twenty-five years the party of the second part shall have the right to cultivate and harvest any crops that may be growing upon the land at that date, paying rent at Five Dollars per Acre per annum for the area of the land that may be so occupied by them.

635 Any disagreement arising between the two parties of this lease as to its interpretation or as to the value of the improvements at the termination of this lease shall be determined by three arbitrators chosen as follows, viz: each of the parties to this instrument shall appoint one and the two so chosen shall select a third, the

decision of the said Arbitrators to be final, and both parties hereby agree to submit to such decision.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

CHAS. NOTLEY & SONS. [ ]
CHAS. NOTLEY, JR. [SEAL.]
WM. NOTLEY. [ ]
JNO. M. HORNER. [ ]
ALBERT HORNER. [ ]
JNO. M. HORNER & SONS, [SEAL.]
Per JNO M. HORNER. [ ]

HAWAIIAN ISLANDS, HAMAKUA, *Island of Hawaii, ss:*

On the 5th day of May A. D. 1883, personally appeared before me Chas. Notley, Sr., William Notley and Chas. Notley, Jr., Jno. M. Horner and Albert Horner, known to me to be the persons described in and who executed the foregoing Instrument, who severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth.

R. A. LYMAN,
Agent to take Acknowledgments for the District of Hamakua, Hawaii.

636 Recorded and Compared this 4th day of March A. D. 1884, at 11 o'clock A. M.

MALCOLM BROWN,
Deputy Registrar of Conveyances.

REGISTER OFFICE,
HONOLULU, H. I., *January 5th*, 1903.

I hereby certify the foregoing to be a true and correct copy of an instrument on Record in this office, in Liber 84, on pages 446, 447 and 448 of Miscellaneous Records.

THOS. G. THRUM,
Registrar of Conveyances.

637 (CONTESTANTS' EXHIBIT 18.)

(Referred to on page 59 ante.)

Stamped $3.—

This Indenture made this — day of August A. D. 1884, between Samuel Parker of Mana, Hamakua, Island of Hawaii, of the first part, and Charles Notley and Sons of Hamakua, Island of Hawaii, of the second part, Witnesseth that in consideration of the sum of One thousand five hundred Dollars paid to the said party of the first part by the said parties of the second part before the ensealing or delivery of these presents, the receipt whereof is hereby acknowledged, by the said party of the first part, do hereby give,

grant, bargain, sell and convey unto the said parties of the second part: All that land situate in Kakaalae of Hamakua in said Island of Hawaii, containing 17 Acres as per Deed dated Jan'y 29, 1883, from J. P. Maui and his wife Keohohiwa and registered Liber 80, pages 68 & 69, in the office of Registrar of Conveyances, Honolulu.

To have and to hold the said granted land, together with all the rights, easements, privileges and appurtenances thereunto belonging or in any-wise appertaining unto them the said Charles Notley & Sons and their heirs and assigns forever.

In witness whereof, the said party of the first — as aforesaid have hereunto set his hand and seal the day and year first above written.

SAMUEL PARKER. [SEAL.]
HATTIE P. PARKER. [SEAL.]

Witness to signatures:
W. R. CUTHBERT.

638 Waimea, Aug. 18th, 1884. Personally appeared before me Samuel Parker and Hattie P. Parker, known to me, and they acknowledged that they executed the foregoing Instrument freely and voluntarily and for the uses and purposes therein set forth, and the said Hattie P. Parker on an examination separate and apart from her husband acknowledged to me that she executed the same without fear, compulsion or constraint from her husband.

GEO. BELL,
Agent to Take Acknowledgments for the District of South Kohala, Hawaii.

Recorded and Compared this 25th day of August A. D. 1884, at 10:45 o'clock A. M.

MALCOLM BROWN,
Deputy Registrar of Conveyances.

REGISTER OFFICE,
HONOLULU, H. I., *January 5th,* 1903.

I hereby certify the foregoing to be a true and correct copy of an instrument on Record in this office, in Liber 92, on pages 130 & 131 of Miscellaneous Records.

THOS. G. THRUM,
Registrar of Conveyances.

639 (CONTESTANTS' EXHIBIT 19.)

(Referred to on page 60 ante.)

Stamped $2.—

This indenture made this first day of December A. D. 1883, by and between Charles Notley and Sons of Hamakua, Hawaii, H. I., party of the first part, and John M. Horner and Sons of the same place, party of the second part, Witnesseth:

That the said party of the first part for and in consideration of the

covenants hereafter mentioned on the part of the party of the second part, their heirs, executors, administrators and assigns, to be paid, kept and performed, hath let unto the said party of the second part, their heirs, executors, administrators and assigns, all that parcel of land situate in Hamakua, Hawaii, H. I., containing Two hundred Acres upon the Ahupuaa of Kukaiau and being bounded on the North by the southern line of a parcel of land leased by the said party of the first part to the said party of the second part on the first day of May A. D. 1883, on the East by a deep Gulch, on the West by a deep Gulch, and on the South by the forest.

Together with all the appurtenances appertaining thereto.

To have and to hold the above described premises, with all the appurtenances thereto belonging, for and during the full term of Twenty-five years from the first day of December A. D. 1883, (renewable for a like term of Twenty-five years at the option of the party of the second part), the said party of the second part yielding and paying rent at the rate of Three dollars per acre per annum,
640 payable quarterly in advance during the continuance of the said term, and the said party of the second part agrees to pay all Taxes levied or assessed by the Hawaiian Government upon all growing crops, buildings or other improvements, and in the event of this lease being given up at the termination of the first term of Twenty-five years, all buildings and other improvements shall remain upon the land, and at the end of the said term of Twenty-five years the said party of the second part shall have the right to cultivate and harvest any crops that may be growing upon the land at that date, paying rent at the rate of Three dollars per acre per annum for the area of the land that may be so occupied by them.

In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

CHAS. NOTLEY & SONS.
JNO. M. HORNER & SONS.

Witness:
ALFRED HORNER.

HAWAIIAN ISLANDS, *Island of Hawaii, ss:*

On this 7th day of February, 1884, personally appeared before me Chas. Notley and Jno. M. Horner, to me well known as the parties described in and who executed the foregoing lease, who acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth. Chas. Notley signed for Notley & Sons and Jno. M. Horner for Horner & Sons.

J. R. MILLS,
Agent to Take Acknowledg'ts, Hamakua & Hilo, Hawaii.

641 Recorded and Compared this 10th day of March A. D. 1884, 11:30 o'clock A. M.

MALCOLM BROWN,
Deputy Registrar of Conveyances.

REGISTER OFFICE,
HONOLULU, H. I., *January 5th*, 1903.

I hereby certify the foregoing to be a true and correct copy of an instrument on Record in this office, in Liber 86, on pages 342 & 343 of Miscellaneous Records.

THOS. G. THRUM,
Registrar of Conveyances.

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(Arranged in chronological order of calling the witnesses.)

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NOTE.—E. Madden's testimony, pages 348 to 359, Official Transcript, appears to have been treated as not evidence.)

References to Exhibits are as follows:

1	on page 18
2 and 3	" 51
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For Exhibits see pages 488 to 512.

644 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Exceptions from Circuit Court, Fourth Circuit.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Submitted July 29, 1903; Decided March 8, 1904.

FREAR, *C. J.*, GALBRAITH and PERRY, *JJ.*:

In deciding the question whether there is sufficient evidence of undue influence in the making of a will to go to the jury, the evidence must be considered in the light most favorable to the contestants; the proponents must be considered as admitting not only the facts which the contestants' evidence tends to establish but also every inference which a jury might fairly draw from such evidence; in order to justify the direction of a verdict for the proponents, there must be such insufficiency of evidence in fact as to amount to insufficiency in law; there must be an absence of material and substantial evidence, which, if believed by the jury, would in law justify a verdict for the contestants; the question is not whether the evidence shows in the opinion of the court that the will was procured by undue influence but whether it was such that the jury could reasonably have so found.

Although in order to set aside a will on the ground of undue influence, it must be proved that such influence operated at the very time of making the will, this may be shown by indirect or circumstantial evidence, but in such case the evidence must be of a very clear and convincing character.

The subsequent execution of a codicil, when such influence is not operative, expressly confirming the will, make it immaterial that the will itself was procured by undue influence, if such were the fact. Undue influence which will vitiate a will is distinguishable from mere influence and from mere bad influence. It must amount to fraud or coercion, or the substitution of another's will for that of the testator.

645 Where it was contended by the wife and children that the will and codicils of the husband and father were procured by the undue influence of a niece who had been brought up in the family as a daughter but where there was no direct evidence of even an attempt to influence the testator, whether duly or unduly, in the making of his will or codicils, and uncontradicted affirmative evidence that she was not present at the execution of the will or either codicil, and the uncontradicted evidence showed that the testator was of sound and strong mind, and the evidence, although it showed that there had been more or less friction in the family due in part at least to the presence and conduct of the niece and that the uncle and niece were very fond of each other and possibly that the latter had the disposition and opportunity to attempt to influence the former in the disposition of his property, yet did not show that she had a general controlling influence over him, and the will itself was not unnatural and its provisions were fully accounted for on other grounds than the undue influence of the niece, it was not error to direct a verdict for the proponents.

A testator may make even what is sometimes called an unnatural will if he does so freely and with a sound mind, but in this case the will was not of that character.

Mere suspicion or conjecture of undue influence is insufficient to justify nullifying an exercise of one's right to dispose of his property by will.

Opinion of the court by FREAR, *C. J.*:
(Galbraith, J., dissenting.)

The Circuit Judge, after a hearing, admitted to probate the will and codicils of the decedent, Charles Notley. The contestants, his widow and four children, Charles, William, Maria and
646 David, appealed to the Circuit Court, and the case was there tried before a jury and a different Circuit Judge on the issue of undue influence by the decedent's niece, Mrs Emma Danford, née Mullinger. At the close of the contestants' case, the proponents moved the Court to direct a verdict in their favor. This motion was granted and a verdict was rendered as directed. The question now raised by the contestants' exceptions is whether there was sufficient evidence of undue influence to go to the jury.

Mr. Notley had lived on the Island of Hawaii half a century. He

successively herded sheep, kept a store and tannery and cultivated sugar cane, and finally his property became of considerable value. He early took an Hawaiian wife, by whom he had a number of children, of whom four survived him. In 1885 he visited England, his native land, and brought back with him his niece, Emma Mullinger, then a child of about thirteen years, whom he brought up as a daughter. In October, 1898, Emma married and moved to Honolulu. The will was executed May 18, 1899; the first codicil, August 2, 1900; and the third codicil April 11, 1902. Mr. Notley died May 2, 1902.

The will gave $1000 to a Miss Barnard, who had lived at the Notley home for a time; $500 to the decedent's brother in England, with a gift of the same by way of substitution to the brother's wife and granddaughter successively; $500 to Emma Mullinger's father in England; the homestead, furniture, etc., on Hawaii to decedent's son David; the proceeds of an insurance policy in equal shares to his wife, his children, William, Maria, and David, and his niece Emma; the residue of the estate to the executors in trust to pay the income thereof in equal parts to the wife, the said three children and Emma respectively, for their lives, and the children of the remaining son Charles, with various provisions by way of substitution, remainder, payment to the children of Charles upon their
647 arrival at certain ages, freedom from the control of their husbands in the cases of Maria and Emma, etc., and finally, on the termination of all the life estate, the corpus was to be divided equally among the heirs of the three children, the niece and the children of the remaining son Charles. Thos. R. Walker and Anthony Lidgate were appointed executors and trustees. The first codicil substituted Cecil Brown as executor and trustee in place of Mr. Walker who had left the Territory, and expressly confirmed the will in all other respects. The second codicil gave the homestead, furniture, etc., to Emma in place of David, with a proviso that the wife should have the use of a cottage on the premises, with its furniture, for life, and expressly confirmed the will in other respects.

The features that are most objected to are that the niece, subject to certain conditions in favor of the wife, instead of the wife, was given the homestead, and that Charles' children, instead of himself, were given most of what would have been given to him if he had been treated like the other children and the niece. The wife, of course, was not bound by the provisions of the will and has in fact elected to take her dower instead, and does not join in this appeal.

The estate is valued at about $400,000 and the contest has been strenuous. The trial judge at the outset adopted the view of the contestants, which is doubtless the correct view, that great latitude should be allowed in the introduction of evidence in a case of this kind, and was extremely liberal throughout in allowing them to introduce evidence that of itself seemed trivial or irrelevant—on the possibility that its relevancy or materiality might eventually be shown by other evidence, or that the evidence might be sufficient as a whole to go to the jury, however weak in its several parts. Counsel for the contestants have in their arguments and briefs made the most of such evidence as they were able to produce. But after
648 examining the lengthy transcript we are unable to find that the trial judge erred in directing a verdict for the proponents.

There is no doubt that in deciding the question whether there was sufficient evidence of undue influence to go to the jury, the evidence must be considered in the light most favorable to the contestants; that the proponents must be considered as admitting not only the facts which the contestants' evidence tends to establish, but also every inference which a jury might fairly draw from such evidence; that in order to justify the direction of a verdict for the proponents there must be such insufficiency of evidence in fact as to amount to insufficiency in law; that there must be an absence of material and substantial evidence, which, if believed by the jury, would in law, justify a verdict for the contestants; that the question is not whether the evidence shows in our opinion that the will and codicils were procured by undue influence, but whether it was such that the jury could reasonably have so found.

There is no direct evidence whatever that Emma ever attempted to influence, whether duly or unduly, Mr. Notley in the matter of his will. The only evidence of anything that ever passed between them on that subject is found in the testimony of his son Charles, to the effect that at the trial before the Circuit Judge Emma testified that she had no knowledge of any will being made, but that she later altered that by stating that Mr. Notley had told her that she was going to have the homestead and that she had replied "Thank you, uncle; I love the dear old place."

The will was executed at the office of Mr. Notley's attorney in Honolulu. The instructions as to its provisions were given to the attorney there. Emma was not present on either occasion. It may be that, as the contestants contend, he was then visiting at
649 her home, though there is not any direct evidence as to that. After her marriage, he sometimes visited her and sometimes his daughter Maria, when he came to Honolulu. The will apparently differed from a former will in the one respect that the son Charles' children were substituted for him. The first codicil substituting Mr. Brown for Mr. Walker as executor and trustee, and expressly ratifying the will, was executed on the island of Hawaii at a time when Emma was living with her husband on the island of Kauai. It was prepared by the attorney at Mr. Notley's request made by letter, though he had spoken about it before, and was sent to Mr. Notley who sent it back to the attorney for keeping after its execution. The second codicil, substituting Emma and the wife for the son David as to the homestead, was executed when Mr. Notley was visiting Emma. It was drafted from instructions given by Mr. Notley alone at the attorney's office, but was executed at Emma's home at the suggestion of the attorney, that he, the attorney, bring the codicil to the house for execution, because at that time exertion on the part of Mr. Notley brought on spells of coughing. The attorney had never met Emma, excepting perhaps once casually a week or so before. Emma was not present at the execution, but brought pen and ink at Mr. Notley's request and then withdrew. Mr. Notley's wife also was staying with him at Emma's home at that time. Mr. Notley was evidently very careful in money and property matters and executed the will and codicils, as the evidence shows, only after giving them very careful consideration.

There being no direct evidence that the niece ever had anything

to do with the making of the will or codicils even by way of suggestion, the contestants endeavor to show that Emma had had an unbroken, profound, dominating influence over Mr. Notley, ever since he met her, and that that influence was of an evil and
650 unnatural character, or, to state their contention in another way, that she had the power to influence Mr. Notley generally; that such influence being evil, in that it was exerted, as contended, in creating family dissensions and depriving the wife and children of natural rights, the presumption is against the rightness of her motives; that she showed a desire to influence the decedent in the matter of his will by threatening to Charles to do so in certain particulars; that she had opportunities to do so; and that the will itself shows that she accomplished her purpose.

There is no doubt, as was said in Herster *v.* Herster, 122 Pa. St. 252, quoting from an earlier case, "that the undue influence must be proved to have operated as a present constraint at the very time of making the will," and of course if either codicil was executed in the absence of such influence, it would be immaterial that the will itself had been executed under such influence, if such were the fact, for in such case the execution of the codicil would amount to a re-execution of the will at a time when the undue influence was not present. Underhill, Wills, Sec. 216. And yet direct evidence of such influence at the precise time of execution is not indispensable. That may be shown by circumstantial evidence. Mental weakness on the part of the testator and general control over him, and desire and opportunity to control him in the disposition of his property by will may be shown—but only in so far as it tends to show that undue influence was in fact operative at the time of the execution, and in such cases the indirect evidence must be of a clear and convincing character; indeed, it is said that it must be not merely consistent with the theory of undue influence, but inconsistent with a contrary theory. Mere suspicion and conjecture are not enough.
Boyse *v.* Rossborough, 6 H. L. Cas. 2, 50; *In re* Langford,
651 108 Cal. 608, 622; Boggs *v.* Boggs, 62 Neb. 274, 285; Maynard *v.* Vinton, 59 Mich. 139, 153; Schuchhardt *v.* Schuchhardt, 62 N. J. *eq.* 710, 713; Beyer *v.* LeFevre, 186 U. S. 114, 126.

The question of the mental and even physical condition or capacity of the testator is a most important one in cases of this kind. What will control one person's mind will not control another's. The question is whether the testator was in fact controlled by another in the making of his will. Any amount of evidence of desire and opportunity alone to exert influence will fall short of proof that the will was the result of undue influence. The question is whether the exertions, if there were any, were undue and effectual. A person of proper age and sound mind has a right subject to a few statutory limitations, to dispose of his property by will as well as by conveyance, and he should not be deprived of that important right by the acts of others through evidence adduced when he is gone and cannot be heard, unless the evidence clearly shows that his volition was in fact overcome by that of others. As is said in Redfield on Wills, p. 518, "these questions (of undue influence) will not be likely to arise, except in regard to persons, naturally

of weak minds, or facile dispositions, or where such has become their condition, either from age or disease." And in nearly all the cases in which wills have been set aside on the ground of undue influence, the mental weakness of the testator has been an important element. In the present case not only was there abundant evidence that the deceased was of strong and sound mind and body, but this was uncontradicted. For instance, Dr. Herbert, his physician, who had known him eighteen years, testified that Mr. Notley "was peculiarly strong in his character; he was firm; he was a man who would impress you as not easily influenced by any one * * * he was a strong character * * * He was a strong man and not a weak man mentally and physically * * * His mental
652 condition during the six months preceding his death was exactly as it was during his previous life, clear and intelligent." Mr. Cecil Brown, his attorney, testified that he was as honest a man as ever walked this earth, a warm-hearted, kind-hearted man, just as sound as you or I, that he showed no indication of failing intellect, and had always been the same; that his illness, when he executed the second codicil, did not affect his mind in the least,—only when he walked too much it brought on fits of coughing.

Thus there is no direct evidence of any attempt at influence, not to mention undue influence, as to the making of the will or either codicil, but, besides the ordinary presumption against undue influence, there is in this case a very great improbability that any such attempt, if it had been made, would have met with success, considering the strength and soundness of the decedent, both mentally and physically. We now come to the question of undue influence itself. This must be distinguished, in the first place, from mere influence. The exercise of mere influence on a testator, even if it should be successful in leading him to make a will which he would not otherwise make, would not necessarily justify setting the will aside. Everyone is subject to influences. Ordinarily a person has a right to dispose of his property by will. If he complies with the statutory requirements, what purports to be his will cannot be set aside unless it is shown not to be his will. This may be made to appear either by showing that the person had not sufficient mind to make a will at all, or by showing that his volition was overcome to such an extent that what purports to be his will was not his will but another's. There must be fraud or coercion. Boyse *v.* Rossborough, *supra.* The testator must have been deceived or forced into doing what he would not otherwise have done. "The undue influence for which a will or deed will be annulled must be such as, that the party making it has no free will, but stands
653 *in vinculis.* It must amount to force or coercion, destroying free agency." Conley *v.* Nailor, 118 U. S. 127, 136. The following from 1 Underhill, Wills, Sec. 144, is amply sustained by the cases:

"Every influence which is brought to bear by a legatee upon the mind of the testator, by means of which the former secures a benefit, is not necessarily undue. The employment of argument or

persuasion, directed to the understanding; of flattery, addressed to the feeling of self-esteem, or of appeals to the affection or pity of the testator, will not constitute undue influence sufficient to vitiate a will which, upon the whole, appears to be the outcome of the free agency of the testator. Honest intercession and solicitation, though insistent and continuous during the period covering the execution of the will, if they do not result in coercing the testator into making a will which he would not have made voluntarily, are not undue influence. It is only when such pressure results in subverting the will of the testator to that of another that it is undue influence. Neither advice nor argument nor persuasion would vitiate a will made freely and from conviction, though the will might not have been made but for such advice and persuasion. Gratitude and affection growing out of benefits conferred or being conferred; esteem and friendship, the result of admiration for another's character, are allowed to have their proper operation upon the mind and volition of the testator. He has a right to keep his mind and heart open to the sweet influences of social ties and to the promptings of the natural love which he may have for those of his own blood. On the other hand, he has a right to listen to the suggestions and solicitations of persons not of his kindred which have for their object the procurement of testamentary benefits at his hands. He may lawfully permit himself to be influenced by motives of friendship; he has a right to remember the
654 claims of those from whose hands he has received favors during his life-time; he may permit himself to be influenced by all those motives, or by requests based upon his gratitude for past benefits or present comforts enjoyed by him. His will should be sustained if, after listening to and deliberating upon the appeals and solicitations, his mind is free from restraint and coercion, and he is at liberty to act freely upon them, to acquiesce in or to reject them, and his will, when it is executed, speaks his own mind and intention, voluntarily formed, and not those of another person or persons."

In the recent case of Naoiwi, 14 Haw. 43, this Court approved a charge to the jury which contained the following:

"Procuring a will to be made, unless by foul means, is nothing against its validity. A man has a right by fair argument to induce another to make a will, and even to make it in his favor. A will procured by honest means, by acts of kindness, by attention and by importunate pursuasion which delicate minds shrink from would not be set aside upon that ground alone. It is only that degree of influence which deprives a testator of his free agency and makes the will more the act of others than his own which will avoid it. Neither advice nor argument nor pursuasion nor entreaty will vitiate a will made fairly and from conviction, though such will might not have been made but for such advice or persuasion. Undue influence is not such as arises from affection or esteem, but it must be the control of another will over that of the testator whose faculties have been so impaired as to submit to that control and to such extent that he has ceased to be a free agent and has

quite succumbed to the controlling power of the mind or will * * * Before this will can be set aside you must believe and find from the evidence that at the time of the execution of the will the mind of Nalimu Naoiwi was so under the control and influence of her husband D. Naoiwi, that she could not if she had wished
655 have made a will different from this; you must believe that she had not sufficient strength of mind to resist such influence exerted by Naoiwi at the time of the execution of the will."

Undue influence in the law of wills must be distinguished likewise from what is commonly spoken of as bad influence.

"In a popular sense," it is said in Boyse *v.* Rossborough, *supra*, "we often speak of a person exercising undue influence over another, when the influence certainly is not of a nature which would invalidate a will. A young man is often led into dissipation by the following example of a companion of riper years, to whom he looks up, and who leads him to consider habits of dissipation as venial, and perhaps even creditable; the companion is then correctly said to exercise an undue influence. But if in these circumstances the young man, influenced by his regard for the person who had thus led him astray, were to make a will and leave to him everything he possessed, such a will certainly could not be impeached on the ground of undue influence. Nor would the case be altered merely because the companion had urged, or even importuned, the young man to so dispose of his property; provided only, that in making such a will the young man was really carrying into effect his own intention formed without either coercion or fraud."

The same is true in the case of a testator or grantor who, though having a wife and legitimate children living, has lived in illegal intercourse with another woman. The influence of such a woman, though extremely undue in one sense, is insufficient to vitiate a will or deed, in the absence of proof that the mind of the testator or grantor was overcome, although the deed or will would be more open to suspicion in such a case than in other cases. Conley *v.* Nailor, *supra*. Of course, we do not imply that the will and codicils in question were the results of either mere influence or bad influence. We are now merely pointing out the nature of undue influence.

656 Bearing in mind, then, that there is no direct evidence of even an attempt at influence in the making of the will and codicils, that the testator was of strong mind, and that influence, in order to vitiate a will, must be such as to overcome the will of the testator by fraud or coercion, what is the nature of the evidence relied on to show such influence? It would be impracticable to set forth all the evidence or the elaborate arguments which the reason and imagination of counsel have built upon it, and yet perhaps we should indicate its general nature. It is designed in general to establish Emma's alleged long continued and complete dominion over the decedent, and the evil, unnatural character of that influence.

According to Mr. Lydgate, who was perhaps the most reliable witness on these points, Mr. Notley was very strict with Emma and

often sharply corrected her for not doing what he had told her to do and saw to it that she obeyed his commands and he apparently thought the Notleys were as much to blame as Emma for what trouble there was. But Mr. Lydgate was one of the proponent's witnesses. We are now concerned with the contestants' evidence. There is no doubt that Mr. Notley and Emma were fond of each other and that there was more or less trouble in the family and that this was due in part to Emma's presence or attitude there. That that should be so to some extent is not altogether surprising, considering the difference in education and tastes between an English girl brought up in England and an Hawaiian and part Hawaiians brought up in Hawaii. Emma may have been somewhat "stuck up" and the others were more or less jealous of her. The evidence seems to indicate that the troubles were due quite as much to their attitude towards her as to her attitude towards them, perhaps more so. If the testimony of the contestants' witnesses is true, Emma said and did things at times that she certainly ought not to have said
657 or done. That is true of some of the Notleys also. But that is not the question. The question is whether she had dominion over Mr. Notley. A large number of incidents were brought out in the evidence, and yet perhaps not so very many when we consider that they were spread over a period of seventeen years. Those who testified to these were chiefly the Notleys themselves. Neighbors in a country district and relatives do not seem to have known that things in the Notley family were in the horrible state claimed. Mrs. Notley herself, whose ill-treatment by Emma is contestants' main reliance, was not called as a witness. Some of the incidents were trifling and remote, some were entirely unconnected with Mr. Notley, or if connected with him, unconnected with Emma, some tended to show on cross-examination of the witnesses that Emma was not at fault and that she often failed in having her own way even when very insistent. She is assumed to have been to blame for everything that went wrong.

It is contended that the status was ideal in the family prior to Emma's advent, that upon her arrival there was a marked change, that she brought about an estrangement between Mr. Notley and his wife and children, usurped the wife's position as mistress of the household, and practically drove her and the children out, depriving them of vital rights and privileges. The witnesses relied on chiefly to show that former conditions were ideal seemed to think not that they were unusually good, but that they were such as are found in ordinary happy families; they testified mostly in regard to a period some years before Emma's arrival and one of them said that there had been trouble once over some Portuguese girls who were treated more as guests than as servants. One of the evidences of the complete change was, as contended, that there was often evening singing in the family before but not after her arrival, and yet, when she arrived, William was confined to a cottage in the yard as a leper and not long after went to the leper settlement on Molokai
658 where he has been ever since; David a few months after Emma's arrival went away to school in California, Emma herself having been away at school in Honolulu much of those few

months; and Maria had married and left the home several years before. Charles and his wife, however, were there. It was Charles' wife who testified that the singing stopped, referring particularly to the first six months after Emma's arrival during much of which time Emma was away at school—and she says that she, the witness, did not then remain long in the parlor evenings because she had to go to her children. Emma's complete control was evident at the very beginning, it is contended, because Mr. Notley writing from England, spoke of her as "a very nice girl" and "crazy" to come with him even against the objections of her mother; and on their arrival from England he took her with his wife and daughters to a restaurant, and Emma whispered something to him, whereupon he asked for a clean tablecloth—which, as contended, he had never done before—and because the waiter would not bring one, he left and took the others elsewhere for lunch. It is true, as contended, that he was proud of his boys before and even adopted the name of "Chas. Notley & Sons" in his business, though apparently without giving them an interest in the business, but there is no lack of evidence that he was proud and fond of all of his children up to the time of his death, except of Charles, whose own conduct gave ample cause, as he believed, for his displeasure, and he treated even Charles almost munificently in a financial way and otherwise treated him kindly after he had disgraced his father's name, as Mr. Notley believed. This is shown by his affectionate letters, his gifts, his visiting them and having them visit him, and by the direct testimony of many of the contestants' witnesses. There was at times trouble between Mr. Notley and his wife, and the wife and Emma. It is contended that Emma practically displaced her. Mrs. Notley was an Hawaiian—a faithful, hard-working woman, but apparently incapable of rising with Mr. Notley's circumstances. She ate Hawaiian food mostly, sat on the floor, would not ride in a carriage, and did not learn Eng-
659 lish during forty-three years of married life with Mr. Notley. It is true she spent much of her time washing and ironing in an out-house after Emma's arrival,—but it is equally true that she did before that and after Emma left. She often, but not always, ate away from the family table after Emma came—especially when she ate Hawaiian food—which she usually ate, but she did this—doubtless not to the same extent—before Emma's arrival and after her departure. Emma was placed in charge, but not until seven years after her arrival, and long before her arrival the daughter Maria seems to have had special charge of the house while the wife did the washing, and after Emma left, after being in charge five years, the granddaughters children of Charles, and not Mrs. Notley, were placed in charge, and, according to the testimony they were treated in all respects just as Emma had been. When Mrs. Notley was told by Charles that Emma had been placed in charge, she replied, "Is that so?" as if it did not make much impression on her. Just how much ill-feeling existed between Emma and Mrs. Notley is doubtful. They were together more or less at the table, in the parlor, riding, traveling, etc. Emma wrote for her to come to Honolulu when Mr. Notley grew worse in his last illness and she came and stayed at Emma's house some weeks. There is testimony that they did not often speak

to each other, that they passed as strangers, though all agree that Mrs. Notley could not speak English and Emma could not speak Hawaiian. A Portuguese who worked for the Notleys when he was a boy, the only witness outside of the Notleys as to the troubles after Emma's arrival, testified that he never saw any conversation between Emma and Mrs. Notley, and "no good faces," but he says also that they could not speak each other's languages, that he never heard Emma say anything cross to any of the Notleys and that she
660 always conducted herself as a lady. He said also that Mrs. Notley often talked to herself and cried and that Mr. Notley and Emma did not appear to be moved by it. Once Emma asked a lady school teacher who took meals at the Notley's to excuse Mrs. Notley for going around in a chemise, thus showing her disposition to undermine Mrs. Notley, and once she told this school teacher, who was an American, that she preferred the English to the American accent of "neither," and the school teacher stopped taking her meals there a day or two after,—whether because of this, or whether, against Mr. Notley's desire, because Emma did not like the school teacher and wanted her to go, does not appear. An attempt was made to show that Emma on one occasion had her servant burn an album that belonged to Mrs. Notley, but it appeared that the servant was a regular household servant, though at a time when Emma was in general charge, that it was at a general cleaning up shortly before Emma's marriage, and there was no evidence to show that Emma knew anything about it. On another occasion when Mrs. Notley "ate rather ravenously" after a long fasting and seasickness, Emma, it is said, looked disgusted and remarked, "Why does aunt eat so?" On another occasion after some conversation in which Mr. and Mrs. Notley and Emma took part, Mr. Notley ordered some rose bushes pulled up to make way for a tennis court. There were tears rolling down Mrs. Notley's cheeks. She had brought water for these roses from some distance in dry seasons. The witness, the Portuguese boy above mentioned, said that he did not know what was said in the conversation, and Mrs. Notley herself was not called as a witness. Mr. Notley once took Emma to the Volcano—where it is said he had never taken his wife. On two occasions he is said to have struck his wife. One of these was in January, 1888, more than eleven years before the will was executed, when, because of a disagreement over some crockery that had been loaned to a neighbor, Mr. Notley struck his wife, knocking her down, and was very repentant immediately afterwards. On this occasion Emma, who was in the yard
661 just after returning from the neighbor's, and who apparently did not see Mr. Notley strike his wife, but saw there was trouble, called to him to "drive that black woman out of the yard, do, uncle, do." One of the witnesses thought that Mr. Notley, who was some distance away and excited, did not hear this, and testified that Emma never before or after called Mrs. Notley a black woman. The other occasion was in February, 1899. It seems that Emma,—during a visit to the Notleys after her marriage,—had recommended having Miss Barnard come to the house and teach the granddaughters music, &c, and be a companion to them. One of the granddaughters testified that, about a week after Emma had returned to

Honolulu, she heard Mr. and Mrs. Notley talking about pictures and Miss Barnard in another room and the words "take that" and what seemed like clapping hands and that Mrs. Notley's eyes were swollen, though not so much as to prevent her from going to church the same day. Several other incidents occurred the same month. Mr. Notley was to accompany Emma back to Honolulu. His trunk and valise were packed and the carriage was at the door. Mrs. Notley said that she did not want him to go, that Emma had a husband who could come and take her back himself. She pushed Emma aside and pushed Mr. Notley into a chair and held him there. Some of his vest buttons came off. Emma cried and said it was the last time she would come there; also, "Who is this woman that you should listen to her?" Mr. Notley did not return with Emma, although counsel contended that "he entertained such confidence in her that he never once opposed her will." Another incident that occurred the same month arose out of a scandalous rumor in regard to some ladies. The manager of a neighboring plantation came to the house and charged Charles with it, and another called him a liar. Mr. Notley also called him a liar and wanted him to apologize, but he said he did not make the alleged scandalous statement and declined to apologize. He (Charles) also testified that the ladies in question were friends of Emma, but that he did not know
662 whether she had anything to do with originating or circulating the story. Referring to the trouble about Miss Barnard just mentioned, Charles also testified that Emma had tried to persuade him that Miss Barnard ought to come, and that he and Mr. Notley had talked the matter over afterwards and that the latter "began to get mad and said he owned the place, he was boss of the place and he would do just as he pleased." "He got furious and said if he could not do as he pleased he would shut up shop and leave." "He said, 'Well, we had planned with your cousin (Emma), that is our plan. If I cannot do it I will shut up shop and leave." But Miss Barnard did not come. Going back to 1888, about two weeks after the incident in regard to the crockery, there was some trouble in which Charles and Emma and the same neighbor as in the crockery matter were concerned. What the trouble was does not appear, but Charles' wife testified that at first Mr. Notley believed Charles and later Emma and then turned Charles and his wife out but after four days he believed Charles again and had them come back and was then very angry with Emma and left shortly after to take her back to England but that after getting as far as Honolulu, he placed her in a family there to be educated and returned home himself. Charles and his wife had been turned out once before, in 1886, by Mr. Notley because his (Charles) wife would not sew for Emma. In 1897, it is contended, Emma tried to have one of the granddaughters, who was visiting the Notleys sent home. She was exercising a supervision over her as well as over two younger granddaughters. It seems that the granddaughter was somewhat ill and that Emma attributed this to too much horseback riding and in the presence of the granddaughter telephoned to the latter's father in Kohala that she was ill from too much horseback riding

and did not obey her (Emma). Mrs. Notley, however, pro-
663 tested and wailed and succeeded in preventing the granddaughter from being sent home. It seems also that Emma had brought the granddaughter from Kohala and accompanied her on her return later. This granddaughter testified also that Mr. Notley was very kind to her, kissed her, &c., and treated everyone there alike, namely, his wife, Charles' four children, Emma, Miss Barnard, and herself; also that on one occasion Emma told one of Charles' children that she was more to Mr. Notley than his wife, that once Emma told the granddaughter that it was not ladylike to sit on Mr. Notley's lap, but that upon her going away and returning she found Emma in her place, and that once Emma told her that Mr. Notley preferred to be alone at his morning meal after the granddaughter had twice taken coffee with him. Another granddaughter testified that she once found Emma listening near the door when Mr. Notley and another gentleman were talking in the parlor, but that she, the witness, had done the same thing when Mr. Notley and his wife had disputes. Other incidents relied on to show Emma's controlling influence were these: On one occasion Mr. Notley made some plans for an addition to the house, which his son David was to build. David proposed changes in the plans but Mr. Notley did not accept them, but when they were all talking the matter over at the table Emma proposed the same changes and Mr. Notley adopted them. The Portuguese mentioned testified that sometimes when Mr. Notley was talking with his wife in the ironing room, he heard Emma's voice calling for him and that he always went when so called—whether to the telephone or to see a caller or for what does not appear. On another occasion on her return from a drive Emma said that she liked the horse very much and was going to ask Mr. Notley for it, and, on being told that she probably would not succeed in getting it, replied that she would get it just the same, and after a while the witness saw the horse in her possession. This witness said also that he was told by his sister Maria
that Mr. Notley gave her also a horse at the same time. To
664 show Emma's influence over Mr. Notley, much is made of his alleged indifference of attitude towards the others on several visits to Honolulu. In December, 1900, he visited Maria, and was more like his old self and gave many Christmas presents. Emma was then on Kauai. But in April following, when Emma was in Honolulu, he was cooler, and in October following when he was at Emma's house he was cooler still. But it also appeared that he wrote Emma about the good time he had had at Christmas with the others, and in April he not only visited Maria, though Emma was in Honolulu, but gave a bicycle to each of Maria's four children, though it was not Christmas time, and in October he called at Maria's about twice a week though he was staying with Emma. But it is said that when he drove by Maria's place in October he would look in when Emma was not with him but not when Emma was with him. Perhaps the two most important incidents relied on are the following to show her connection with the will. Just before Emma's wedding, according to Charles, he was preparing to get the dancing tent ready and to decorate with ferns, when Emma came out and said that she did

not think there was any use in going on with the preparations as Maria had telephoned that she would not come because Emma was described as daughter instead of niece in the invitation, and Emma said that it was very funny, and that she had thought that the others always took her in as a sister, and Charles replied that he had not, and that he had learned that Mr. Notley had bought property in her name in Honolulu (a $5000 home as a wedding gift) and that he, Charles, did not think it was right towards his mother. Emma said she did not know of it and that if that was the way he thought of Uncle, she would see that he did not get anything out of this property. She also said that she had adoption papers, which Charles says he did not know of before. Charles told her he did not know who she was. He testified that he must have insulted her then, that he was mad because his father bought the property and that he did not doubt that Emma knew nothing about it
665 beforehand. The other occasion was in February 1899, when in Mr. Notley's hearing she, being worked up, said to Charles that she would see that Miss Barnard would get something out of the property, and Mr. Notley thereupon said to her, "get back, get back." Several incidents are relied on to show that Mr. Notley confided in Emma and discussed his plans with her to the exclusion of the family. For instance, Maria testified that in 1898 when she and Emma were talking of different things the latter mentioned that Mr. Notley intended to take a trip to New Zealand, but did not know whether he would go then or not, and that this was the first time she, the witness, had heard about it, but she also testified that Mr. Notley himself afterwards spoke to her about it—and whether she had not learned of it before because she was away from home, or whether Mr. Notley had spoken of the trip to other members of the family, does not appear. It is contended that in the boom times in 1899 he let Emma but not the others know of an option he gave to Mr. Andrade on his Hawaii property for $1,000,000. That option was negotiated at Emma's house but not in Emma's presence. The proposition came from Mr. Andrade. A clause was inserted in the agreement to the effect that Mr. Notley did not guarantee a release of his wife's dower. He told Mr. Andrade that he would try and secure a release but that he should keep the matter secret because his son Charles was a rascal and had more influence with his wife than he had and might knock the plan on the head. Later he wrote to his son William, who had written about the option, and denied that he had offered to sell his property, but also wanted to know who had told him and that he, Mr. Notley, did not have anything to do with Charles because he, Charles, had treated him like a brute. Later he apparently told David about it and tried to get him to use his influence with Mrs. Notley, to secure a release of dower, and gave him $2000 and spoke to him in much the same way about
636 Charles. Likewise it is contended that he discussed his will with Emma but not with the others. This is shown, it is contended, by the fact that he told Emma that she was to have the homestead—which he gave to her in the second codicil. But it also appears that he had twice spoken to his daughter Maria in regard to the subject of the first codicil before executing it. Considerable

is made of the contention that Emma practically ostracised David—forcing him to be a mere dock laborer, but she and David appear to have been very friendly, and Mr. Notley had expressed gratification that David was the only son that had not squandered his money and had admired him because he was working on the docks, and David himself says that his father took him to dine with him on Sundays, when in Honolulu, that he lived in a house that was under his father's control, that he obtained through his father's influence a government job which he held six or eight years, that when his father engaged him to build an addition to the house on Hawaii he returned to Honolulu of his own accord, that he worked on the docks of his own volition, and that he did not blame either Mr. Notley or Emma for it, although he does say that his father once refused to pay a doctor's bill for him, and once refused to take him to the plantation to work, but also that besides the $2000 above mentioned his father gave $5000 to him as well as to each of the other children in 1897. To show that Emma was scheming all along for the decedent's property and cared nothing for him, it is shown that on the night before he died Emma said she would have nothing more to do with him after he was dead, and that the funeral was held at the undertaking parlors. This remark is rather ambiguous. Whether she meant that she did not want anything to do with him or that the members of the family and not she would have the decison as to the funeral arrangements is not clear. Emma proposed that his body be taken home to Hawaii and buried at the church he had helped to build. Maria, the witness on this point, thought it a good plan and suggested it to the mother. The latter,
667 however, did not like it. And then Emma made the remark mentioned. Whether she declined to have the funeral at her house or not, or why it was not held at Maria's does not appear. It does appear that when Mr. Notley was ill on Hawaii she was sent for by Mr. Lydgate, who represented that he was not receiving the attention he needed—not because the wife and granddaughters did not do all they could but because they were not sufficiently skilled,—that she went up and took care of him, that he improved and was brought to Honolulu, that she nursed him until a trained nurse was obtained, that she wrote to Mrs. Notley to come down when he got worse, that the latter came and stayed at Emma's house until Mr. Notley's death, and that David called after the funeral to thank her, Emma, for what she had done for his father.

The foregoing comprise nearly all the incidents relied on by the contestants, but of course without all the shadings and settings, or the embellishments of counsel's arguments. Comment on them is hardly necessary, except to say that in most instances the first statements—unsatisfactory enough in themselves,—were so qualified and explained later by the contestants' own witnesses as to remove most of what little force they would otherwise have. All that is necessary is to read them in the light of the principles, above set forth, of the law of undue influence in connection with wills. There is considerable evidence of something, but of what? A jury might be justified in finding that Emma's presence and conduct produced a decided change for the worse in the Notley family, that she and Mr.

Notley thought a great deal of each other, and even that she had the disposition and opportunity to try to influence him in the matter of his will, but not that he was weak-minded or that she had a general control over him, or that she did control him or substitute her will for his in the final disposition of his property.

668 But, it is contended, the will itself is a loud witness—it is "unnatural" and "reeks and drips with undue influence" and carries out Emma's previous threats. First, $1000 out of $400,000, perhaps twice that value at the date of the will, is given to Emma's friend, Miss Barnard, but it may be added that Miss Barnard was also a friend of Mr. Notley. She had lived near by, as a school teacher. On the death of the one with whom she was staying, Mr. Notley invited her to his house, where she remained a long time. One of the contestants' witnesses says that Mr. Notley treated her like the rest at his home. When Emma said that she would see that Miss Barnard got something, Mr. Notley rebuked her. When she tried to have Miss Barnard become an inmate of the Notley home a second time, she failed. Whether she ever spoke to Mr. Notley again about Miss Barnard's getting something, does not appear. If she did, and even if he inserted the item in the will in consequence, there is nothing to indicate that he did so because, not wishing to, he could not resist. Secondly, it is said that Emma prevented Mr. Notley from giving his own brother more than $500 and compelled him to give her father, the husband of Mr. Notley's sister, that amount—as much as to his own brother. No comment is necessary—especially in the absence of any evidence as to the circumstances of the brother and brother-in-law or of Mr. Notley's inclinations towards them. As to the main provision in the will, it is not strange that he treated Emma like the other children, considering what she had been to him for fourteen years; it is true that he gave her as much as the wife, but he also gave the others the same; that he did not give his wife more is perhaps not strange, considering her advanced age and simple tastes. As to the homestead, while he did not give that to his wife, he did not give it to Emma by the will. As to Charles, he himself repeatedly indicated sufficient reasons for leaving him out. These were stated by

669 him not only to Mr. Lydgate and Mr. Brown but to his children, William, David and Maria, and to Mr. Andrade. He felt that Charles had disgraced his name by defaulting when employed in the customs house at Hilo, and he had to pay $7000 to clear him. He said that he resigned from the constitutional convention or the Legislature because of the disgrace brought on his name. He blamed Charles for the trouble between himself and his wife. He blamed him for squandering his money. He called him a rascal to Mr. Andrade. He had, as shown above, had difficul- with him at home. And yet he gave to Charles' children what he did not give to Charles, except as to the insurance. As to the first codicil it is contended that Emma had the testator substitute for one of the executors another who was not a member of the family, but the substitute was a friend and the attorney of Mr. Notley and accepted only at the latter's earnest request and Emma had then never even met him, and the substitution was made when Emma was

hundreds of miles away, and neither of the persons previously named as executors were members of the family, and the facts stated above are ample to explain why Mr. Notley did not wish to appoint Charles, who alone, it is contended, would have been appointed but for Emma, because the testator had twice told Maria that he thought some of appointing Charles. As to the second codicil, the homestead, while not given to the wife, was not taken from her, but was taken from David, with whom Emma was most friendly, and the wife to whom Emma was perhaps most hostile was given what she was not to have before—a life interest in the cottage which she had long occupied. The homestead was apparently not of very great value. The objection is that it was not given to the wife.

The will may not be commendable. It may not be what a jury might think it should be, but it is not unnatural in the sense contended. The question is not what the testator ought to have done or what Emma ought to get, but whether the right of the
670 testator to dispose of his property as he pleased, subject to statutory limitations, may be taken from him on mere suspicions or conjectures and that, too, when he can not be heard. The following is from *In re* Langford, 108 Cal. 608:

"The consideration of the question whether or not a will is 'unnatural'—by which is meant, we suppose, different from what it might have been expected to have been—is of no importance except in a case where there is some evidence immediately tending to show mental incapacity, fraud or undue influence; in which event it might serve to help out a weak case. But there is no evidence in the case at bar that could be thus helped out. A will cannot be upset *because* in the opinion of a jury or court it is unnatural. In the opinion of the McDevitt case it is said: 'Although I do not think it of special interest here, it is well to remember that one has the right to make an unjust will, an unreasonable will, or even a cruel will. Generally, such questions turn our thoughts, as they are often intended to, from the only question at issue, which always is, only, Is the will the spontaneous act of a competent testator? Of course, juries lean against wills which to them seem unequal or unjust. But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and the courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper' * * * And indeed, if it were important to consider it, we do not see how the will in the case at bar can be considered unnatural in such extreme case as to be remarkable. At the time of the execution of the will the contestants—children of the first wife—were all grown up, middle-aged people, with families of their own. He had seen but little of them after his marriage, and in a few years afterward he had moved away from them to California. They had strenuously opposed the marriage, and had said unkind things to his wife; and, as was very natural, there was not much social intercourse between the families afterward. * * *

Of course, the contestants attribute this to the influence of the appellant, and they testify to statements which they say the decedent made to them tending to support that view; nevertheless the fact was that they came to California against his protests and thereby greatly displeased him. * * * Looking through the transcript in this case we see no evidence at all sufficient to warrant a jury in annulling the solemn acts by which the decedent executed his will, and republished it in the codicil. If the law is to be changed, and the right of disposing of one's property by will, the policy of which has been sanctioned by the wisdom and experience of many generations of men, is to be taken away, that result must be effected by the legislative department of the government. As the law now stands that right cannot be frittered away after the death of the testator according to the tastes and notions of others. It is quite likely that in the case at bar the provisions of the will did not meet with the approval of the jurors; but their approval was not necessary."

671 In Cauffman *v.* Long, 82 Pa. St. 72, the following language is used:

"The growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged. No right of the citizen is more valued than the power to dispose of his property by will. No right is more solemnly assured to him by the law. Nor does it depend in any sense upon the judicious exercise of it. It rarely happens that a man bequeaths his estate to the entire satisfaction of either his family or friends. In many instances testamentary dispositions of property seem harsh, if not unjust, the result, perhaps, of prejudice as to some of the testator's kindred, or undue partiality as to others. But these are matters about which we have no concern. The law wisely secures equality of distribution where a man dies intestate. But the very object of a will is to produce inequality, and to provide for the wants of the testator's family; to protect those who are helpless; to reward those who have been affectionate, and to punish those who have been disobedient. It is doubtless true that narrow prejudice sometimes interferes with the wisdom of such arrangements. This is due to the imperfections of our human race. It must be remembered that in this country a man's prejudices are a part of his liberty. He has a right to them; he is entitled to the control of his property while living, and by will to direct its use after his death, subject only to such restrictions as are imposed by law. Where a man has sufficient memory and understanding to make a will, and such instrument is not the result of undue influence, but is the uncontrolled act of his own mind, it is not to be set aside in Pennsylvania without sufficient evidence, nor upon any sentimental notions of equality."

The contestants rely in general on two classes of cases. The principal case in one of these classes is Dean *v.* Negley, 41 Pa. St. 312. This is cited to show that while the influence of a lawful relation over testamentary dispositions may be proper, that of an unlawful relation is not proper, the contention being that Emma was a continuing trespasser in the Notley home. Of course, there was nothing

unlawful in Mr. Notley's taking his niece and bringing her up as his daughter. The case relied on belongs to the class in which a devise or bequest is made in favor of one with whom the testator has lived in illicit intercourse. No doubt such adulterous cohabitation may be shown—to be considered on the question of undue influence in connection with other circumstances, although a testator may lawfully leave all his property to his mistress to the exclusion of his lawful wife, subject to statutory restrictions, if he does
672 so with a free and sound mind. Most authorities do not go as far as the case cited, and even that case not only contains strong language in support of the views we have expressed in this opinion, but differs greatly from this case in its facts. There the relation was unlawful; here not. There the testator was of weak mind; here not. There the beneficiary was a strong woman, who had controlled the testator in other business matters; here not. See Conley *v.* Nailor, 118 U. S. 127, cited above; Arnault *v.* Arnault, 52 N. J. Eq. 801.

The other class of cases relied on is represented by Rollwagon *v.* Rollwagon, 63 N. Y., 504; Tuler *v.* Gardner, 35 N. Y. 559; and Delafield *v.* Parish, 25 N. Y. 9. These cases are cited on the question of general influence and other incidental questions. They differ from this case as white from black. Counsel rely largely on isolated expressions contained in these cases. It will be impracticable to set forth all the respects in which the facts differ from those in this case. By way of illustration we may mention that in the Rollwagon case, among other points of difference, the testator, an uneducated man of great wealth, who had married his housekeeper not long before, more at her seeking than his, and who was entirely dependent on her, was a confirmed invalid and so far gone that he could not speak, and the wife sent for the attorney and gave him all the instructions as to the contents of the will. The wonder is that there were dissenting opinions in these cases. In the Gardner case, for instance, all the members of the Supreme Court and three members of the court of appeals held that the charge of undue influence was not made out. Other cases above cited in this opinion are much more in point. Special attention may be called to one of them, a very recent case decided by the Supreme Court of the United States, Beyer *v.* Le Fevre, 186 U. S. 114. That was a case in which the testatrix, after giving five dollars each to two sisters and a niece, left all the rest of her property, including the homestead, to a
673 nephew and niece, whom she had brought up, to the exclusion of her husband, but on condition that they should provide a home for him. In the trial court a jury found against the will on the issue of undue influence. On appeal the Circuit Court of Appeals sustained the decree based on the verdict. The case was a much stronger one for the contestants than the present case in several important respects. The language of the Court on the various phases of the case is so peculiarly applicable to the present case that we would like to give it in full, but this opinion is already too long. The Court referred to its rule not to examine the facts when both the trial and appellate courts below agreed and especially when in the first instance the facts had been found by a jury, but said that at the

same time it was the right and duty of the court to set aside a verdict when it was wholly unwarranted by the testimony, and then after reviewing and commenting on the facts, concluded as follows:

"One who is familiar with the volume of litigation which is now flooding the courts cannot fail to be attracted by the fact that actions to set aside wills are of frequent occurrence. In such actions the testator cannot be heard, and very trifling matters are often pressed upon the attention of the court or jury as evidence of want of mental capacity or of the existence of undue influence. Whatever rule may obtain elsewhere we wish it distinctly understood to be the rule of the Federal courts that the will of a person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only a possibility or suspicion of undue influence. The expressed intentions of the testator should not be thwarted without clear reason therefor."

A number of exceptions were taken to rulings rejecting or admitting evidence. These need not be considered in detail. The rulings were either correct or else were harmless errors in the view that we take of the case.

The exceptions are overruled and the case remanded to the Circuit Court for such further proceedings as may be proper and consistent with this opinion.

Holmes & Stanley, C. Brown and G. A. Davis for proponents.

Kinney & McClanahan and J. J. Dunne for contestants.

(S.) W. F. FREAR.
(S.) A. PERRY.

674 Dissenting Opinion of GALBRAITH, *J.*:

I am constrained to withhold my assent to the judgment of the Court in this Cause as well as to the reasoning on which it is based although I agree that the rules of law quoted and cited are in the main correct and well established but the application made of those rules in this case, is, in my opinion, clearly erroneous.

It is undoubtedly true, as stated by the majority, that, "In deciding the question whether there is sufficient evidence of undue influence in the making of a will to go to the jury, the evidence must be considered in the light most favorable to the contestants; the proponents must be considered as admitting not only the facts which the contestants' evidence tends to establish but every inference which a jury might fairly draw from such evidence." In other words, a motion to direct a verdict, like a demurrer to the evidence, admits not only what the testimony proves, but also every conclusion or inference a jury might fairly or reasonably draw therefrom and in the consideration of such motion the court should take that view of the evidence most favorable to the party against whom it is directed and should deny the motion when reasonable men might fairly differ as to the effect of the facts proved or in the inferences to be drawn from them or when in any view of the evidence the party against whom the motion is directed should prevail.

These principles applied to this case do not justify shading the evidence in favor of the proponents or taking that view of it most

favorable to them. For instance, these principles do not warrant the deduction that the son, Charles, was disinherited on account of the Hilo Custom House episode—whatever that was—in 1895, since it is clear that there was a reconciliation between him and his father after that for the latter invited Charles and his family to
675 return to the homestead to reside and they did return there and remained during the greater part of the years 1896, 1897 and 1898. Again in 1897 when the decedent gave each of his children and Miss Mullinger five thousand dollars, Charles was included and treated the same as the others. Is it not more reasonable to infer that the cause of Charles' disfavor with the decedent arose subsequent to 1897? Was it caused by Emma Danford's dislike for Charles and by undue influence exerted by her over decedent or by some other influence? Whatever the cause may have been I am not able to say under the evidence that reasonable men would agree in their conclusion or attribute it to the same cause.

The testator died May 2, 1902. The will and codicils admitted to probate as his last will and testament were as follows:

"Know all men by these presents, that I Charles Notley, of Paauilo, in the District of Hamakua, Island of Hawaii, being of sound and disposing mind and memory, do make, publish and declare this my last will and testament, hereby revoking and making null and void all wills by me heretofore made.

"I hereby nominate and appoint Thomas Rain Walker, of Honolulu, Island of Oahu, and Anthony Lidgate of Paauilo, in the Island of Hawaii, to be the Executors and Trustees of this my last will and testament, to serve as such without giving bonds.

"First. I give, devise and bequeath unto Miss Josephine M. Barnard of Laupahoehoe, Island of Hawaii, the sum of One Thousand Dollars.

"Second. I give, devise and bequeath unto my brother John Notley of Edgervare Road, Burnt Oak, London, England, the sum of Five Hundred Dollars; but in the event of my said brother John dying before me, then I give, devise and bequeath said sum of Five Hundred Dollars to Charlotte Notley, the wife of my said brother John, and in the event of the death of the said Charlotte Notley before me, then I give, devise and bequeath said sum of Five Hundred Dollars to Ada Baker of Edgervare Road, aforesaid, the granddaughter of my said brother John and his wife Charlotte Notley.

"Third. I give, devise and bequeath unto John Mullinger of South Lopham, County of Norfolk, England, the sum of Five Hundred Dollars.

"Fourth. I give, devise and bequeath unto my son David Fyfe Notley and his heirs my homestead lot or dwelling house and premises situate at Paauilo aforesaid, together with all and singular the furniture, crockery, plate, pictures, linen and household furniture of every kind as well as all carriages and other vehicles used for pleasure or otherwise, being in and upon the said building and premises.

"Fifth. I give, devise and bequeath to my wife, Mary K. Notley, and my children William Notley, Maria, the wife of Thomas Hughes, and David Fyfe Notley, and my niece Emma Danford, née Mull-

inger, the proceeds in money arising from and out of the Policy of Insurance on my life No. 125095 in the New York Mutual
676 Life Insurance Company, share and share alike.

"Sixth. All the rest, residue and remainder of my estate, real, personal or mixed, and wherever situate, I give, devise and bequeath unto the said Thomas Rain Walker and Anthony Lidgate, in trust nevertheless for the uses and purposes herein set forth, that is to say: to pay the rents, issues and profits arising from and out of my said estate in manner following:

"One-sixth thereof to my wife Mary K. Notley during the term of her natural life, such payments to be in lieu of her dower right in my estate, and from and after the death of my said wife, the said one-sixth share or part of said income shall be divided among the surviving devisees named in this my will in the shares and proportions hereinafter set forth and limited to each of them.

"One-sixth thereof to my son William during the term of his natural life, and from and after the death of my said son William, then to Melisa, the wife of said William, during the term of her natural life; and from and after the death of the said Melisa the said one-sixth share or part of said income shall be divided among the surviving devisees share and share alike.

"One-sixth thereof unto the children of my son Charles Notley Jr., named John, Victoria, Maria, Lilly and William, share and share alike. And I hereby direct my said Trustees not to pay any of said share of said income unto any of the above named children of my said son Charles Notley Jr. until such time as each of them, being males, shall arrive at the age of twenty-one years, and, being females, shall arrive at the age of eighteen years; and that in the meantime and until the happening of such event as to each of said children, I direct my said Trustees to keep said one-sixth share of said income invested in such securities as they or their successors may think proper, and the income, rents, issues or profits thereof shall be divided equally, among said children upon the arrival of them at the age of twenty-one years and eighteen years respectively as hereinbefore limited. And in the event of the death of any of said children before the arriving at the ages aforesaid, or in the event of their death after the arrival at the ages aforesaid, the heirs of such children shall take the share of the child so dying.

"One-sixth thereof unto my daughter Maria, the wife of Thomas Hughes, during the term of her natural life, free from all control or liability of the marital rights of any husband.

"One-sixth thereof to my son David Fyfe Notley, during the term of his natural life, and

"One-sixth thereof to my niece Emma Danford, née Mullinger, during the term of her natural life free from all control or liability of the marital rights of any husband.

"And from and after the death of all my said children and my said niece Emma Danford, née Mullinger, I hereby direct my said Trustees or their successors to convey all of my estate among the heirs-at-law of my said children William, Maria, David Fyfe, and my said niece Emma Danford, née Mullinger, and the children of my said son Charles Notley, Jr., namely:—John, Victoria, Maria, Lilly and William, share and share alike.

"And I direct, that until the death of all the legatees last named, the income accruing from said trust estate, shall, until such event happen, be paid among the heirs-at-law of all such as may have died before the death of the survivor of said last named legatees.

"In the event of the death, resignation or any disability of my said Trustees or either of them, I hereby direct the Court having jurisdiction of the Probate matters and wherein my will is
677 probated to appoint a new Trustee or Trustees as the case may be.

"I hereby authorize and empower my said Trustees or their successors to make such changes and alterations in the nature and kind of investments of my estate and vary the same in such manner as in their discretion will result to the best advantage of said estate, and also to use, handle, control, invest and re-*re*-invest all property belonging to said estate in such manner as to them shall seem proper for the best interest of those interested in said estate.

"In witness whereof, I have hereunto set my hand and seal this 18th day of May, 1899.

(Signed) CHARLES NOTLEY. [SEAL.]

"Signed, sealed, published and declared by the said Charles Notley as and for his last will and testament in the presence of us, who in his presence and in the presence of each other, and at his request, have hereunto set our hands as witnesses this 18th day of May, 1899.

"(Signed) CECIL BROWN, *Honolulu.*
"(Signed) FRANK F. FERNANDES, *Honolulu.*
"(Signed) ALEX. ST. M. MACKINTOSH, *Honolulu.*"

"Codicil to the last will and testament of me, Charles Notley, the elder, of Paauilo, in the District of Hamakua, Island of Hawaii, which bears date the 18th day of May, 1899.

"Whereas, by my said last will and testament I have appointed Thomas Rain Walker to be one of the Executors and Trustees thereof, and as the said Thomas Rain Walker intends to depart out of the Territory of Hawaii and reside in England, I am desirous that Cecil Brown of Honolulu, in the Island of Oahu, shall be substituted as a trustee and executor of my said Will, and to serve as such in the place of said Thomas Rain Walker.

"Now, therefore, I do hereby revoke the appointment of said Thomas Rain Walker as such executor and trustee, and do hereby nominate and appoint the said Cecil Brown to be an executor and trustee of my said last will and testament in the place and stead of said Thomas Rain Walker, and to serve as such without giving bonds.

"And I declare that my said last will and testament shall be construed and take effect as if the name of the said Cecil Brown were inserted therein throughout instead of said Thomas Rain Walker's name. In all other respects I confirm my said Will.

"In witness Whereof I have hereunto set my hand and seal at Paauilo aforesaid, this 2nd day of August, 1900.

"(Signed) CHARLES NOTLEY.

"Subscribed by the Testator in the presence of each of us, and at the same time declared by him to us to be a codicil to his last will and testament, and thereupon, we, at his request, sign our names hereto as witnesses, this second day of August, 1900.

"(Signed) WM. H. SIEBECKER.
"(Signed) J. LEONHART."

"This is a second codicil to my last Will and Testament which bears date the 18th day of May, 1899.

"First. I hereby ratify and confirm my said Will and the first codicil thereto in every respect, save and except so far as the said Will and codicil is altered by and is inconsistent with this codicil.

678 "Second. I hereby revoke the fourth clause or subdivision of my said Will on page two thereof, being the devise to my son David Fyfe Notley of my homestead lot or dwelling house and premises and household furniture, etc., and other property therein mentioned, and in place thereof,

"I give, devise and bequeath unto my niece Emma Danford, the wife of H. D. Danford of Honolulu, in the Island of Oahu, all of that real property, situate and being at Paauilo, in the District of Hamakua, Island of Hawaii, and Territory of Hawaii, at present occupied, used and enjoyed by me as my residence or homestead, and contains about four acres, together with all the household furniture, plate, silver-ware, linen and all and every other kind of fixtures and utensils therein or used in connection therewith, including the carriages, harnesses and horses used by me in said Hamakua, and being a part of my household property and generally used and enjoyed by me in connection therewith.

"To have and to hold the same unto the said Emma Danford, for her sole and separate use and behoof forever.

"Provided, however, and it is my wish, and I hereby declare that my wife Mary K. Notley shall have the use and occupation of the cottage that is upon said residence premises and which lies on the north side of the tennis grounds on said premises, together with all the use of the furniture and houshold fixtures in said cottage, for and during the term of her natural life.

"In Witness Whereof, I, Charles Notley, the elder, have hereunto subscribed by hand and seal at Honolulu, in the Island of Oahu and Territory aforesaid, this 11th day of April, 1902.

"(Signed) CHAS. NOTLEY. [SEAL.]

"Subscribed by the said Charles Notley, the elder, in the presence of each of us, and at the same time declared by him to us to be the second codicil to his last will and testament, and thereupon, we, at his request, and in his presence hereto sign our names as witnesses at Honolulu aforesaid, this 11th day of April, 1902.

"(Signed) CECIL BROWN, *Honolulu.*
"(Signed) FRANK F. FERNANDEZ, *Honolulu.*"

The questions of facts framed by the contestants for the jury were as follows:

"1. Are the documents dated May 18, 1899, August 2, 1900, and April 11, 1902 * * * the last will and testament of Charles Notley, deceased?"

"2. Were such alleged will and codicils executed and published by the said Charles Notley under and by virtue of undue influence exercised by Emma Danford at the time of the execution and publishing thereof?"

The trial in the Circuit Court commenced on January 23, 1903, and ended five days thereafter by the verdict rendered by direction of the court. Many witnesses were examined on behalf of
679 the contestants. The transcript of the evidence constitutes some four hundred typewritten pages besides numerous exhibits consisting of letters, contracts, deeds, etc.

The motion to direct the verdict was based on the ground that there was no evidence to support the theory of the contestants and presumably granted for that reason.

It is contended by the contestants that the arrival of Miss Mullinger wrought a distinct change in the Notley family—that it was contemporaneous with the springing up of discord and family bickerings that scattered the children from the homestead and caused the decedent to strike his wife, something he had never been known to do before, and finally ended in the installation of Miss Mullinger as mistress of the home and the location of the wife and mother in a small cottage in the yard; that Miss Mullinger usurped the place in the decedent's affections that of right belonged to the wife; that in all disagreements between Miss Mullinger and other members of the family, and these were not infrequent, the decedent uniformly sided with the former and against the latter; that for years prior to the execution of the will and up to the time of decedent's death Miss Mullinger's wish was the law of the Notley family and that the provisions of the will and codicils, namely, that disinheriting the son, Charles, the clause tying up the bequest to his children until the youngest becomes of age, the bequest to Miss Barnard who had no claim on decedent's bounty, and the codicil bequeathing the homestead to Mrs. Danford instead of the wife, with the other evidence given, demonstrates that the will and codicils admitted to probate express the wish and desire of Mrs. Danford and were not the free and voluntary act of the decedent.

The evidence given, much of which is referred to in the majority opinion, tended in some degree to establish many of these contentions either directly or indirectly.

680 There can be no doubt from the evidence that Mrs. Danford had ample opportunity to exercise undue influence over the decedent and there is also testimony tending to show a disposition to influence him against Charles and the mother providing she had the power to do so.

The lawyer who wrote the will testifies that it is the free and voluntary act of the decedent. The will was executed May 18, 1899, while Mr. Notley was stopping at Mrs. Danford's, on Kinau street,

Honolulu, and following the visit of Mrs. Danford to Hamakua in February, 1899, when she and the decedent had tried to induce Charles to persuade his mother to permit Miss Barnard to be installed in the house as governess.

It is in evidence that when this effort resulted in failure Mrs. Danford said she would see that Miss Barnard was remembered in decedent's will. It was only the preceding October, on the day before her marriage, that Mrs. Danford threatened Charles in effect that she would see that he did not get anything by "uncle's will."

The attorney who wrote the second codicil testifies relative to its execution, in part as follows:

"He came into the office I think three or four times previously and took the will, which was sealed in an envelope, he took and read it over and told me to put it back with the other papers in the safe, then he came on this day and told me he wanted to make a change.

"Q. How did he look?

"A. He was suffering from a very bad cough, the slightest exertion made him cough, otherwise he looked very well.

"Q. You knew him intimately for a number of years?

"A. Very intimately. I knew that he was down here on account of being ill, under treatment of Dr. —— at the time for congestion of the lungs.

681 "Q. What would you suppose as to whether or not that man on that day was in full possession of his mental faculties?

"A. I am just as positive that he was in full possession of his mental faculties as I am here today.

"Q. And you drew that second codicil to the will absolutely in accordance with the old man's instructions?

"A. I did it with his instructions, the second codicil. I received my instructions from him——

"Q. Who was present at the time he signed the second codicil?

"A. Mr. Fernandez, I told Mr. Notley at the time; I noticed that he coughed so much, there was such a strain on him, I said: Mr. Notley if you like I will bring this codicil up to the house where you are staying, and you can execute it there, it will save you from walking around so much; and he thanked me and said, 'That is all right, you are a good boy,' etc.

"Q. Who was present when you executed that second codicil?

"A. I, with Frank Fernandez, nobody else, Mrs. Danford wasn't there. The only time I saw her was when she brought some ink. He read the second codicil over himself, and I read it over to him."

This testimony certainly proves that the decedent was at least physically weak at the time of the execution of the second codicil and that his environment, at that time, was favorable to the exertion of undue influence as contended by the contestants.

The question presented by the exception under consideration is not whether the evidence shows that the will and codicils were executed under and by virtue of undue influence exercised by Mrs. Danford but whether there is any evidence from which the jury

may have reasonably inferred that such undue influence was exercised.

682 "It is impossible to define or describe with precision and exactness what is undue influence; what the quality and the extent of the power of one mind over another must be to make it undue, in the sense of the law when exerted in making a will. Like the question of insanity, it is to some degree open and vague, and must be decided by the application of sound principles and good sense to the facts of each case. (Lynch *v.* Clements, 24 N. J. Eq. 431.) But the influence exercised over a testator which the law regards as undue or illegal, must be such as to destroy his free agency; but no matter how little the influence, if the free agency is destroyed it vitiates the act which is the result of it." * * *

"The undue influence is not often the subject of direct proof. It can be shown by all the facts and circumstances surrounding the testator, the nature of the will, his family relations, the conditions of his health and mind, his dependency upon and subjection to the control of the person supposed to have wielded the influence, the opportunity and disposition of the person to wield it, and the acts and declarations of such person." Rollwagon *v.* Rollwagon, 63 N. Y. 504, 519.

It was said by the Supreme Court of Michigan in deciding a recent case: "The principal question urged in the case, and pressed upon our attention with great vigor by proponent, is that of whether there was any evidence tending to show the exercise of undue influence which justified the submission of the case to the jury. It is undoubtedly true that the testimony relating to the exact time of the execution of this instrument strongly supports the proponent's case. The testimony of Judge Whipple, who drew the will, and of the witnesses who attested it, clearly demonstrates that, at the precise time of the execution of the will, no immediate, present influence was being exerted to control the mind and will of Dr. Reed. But this is not decisive of the case. If an unwarranted influence had

683 been exerted theretofore, the effect of which still remained, and which was sufficient in fact to subordinate the will of Dr. Reed to that of Hannah Waters, this influence was undue, as much as though it was exerted at the very time the will was executed. See Petter's Appeal, 53 Mich. 106, (18 N. W. 575.) Indeed it is recognized by the authorities that undue influence is usually exercised secretly, and in a clandestine manner; and, as was said by Mr. Justice Grant in Rivard *v.* Rivard, 109 Mich. 111 (66 N. W. 686, 63 Am. St. Rep. 570): " 'It is largely a matter of inference from facts and circumstances surrounding the testator, his character and mental condition as shown by the evidence, and the opportunity possessed by the beneficiary for the exercise of such control.' See also 1 Underh. Wills, 132." Waters *v.* Reed, 129 Mich. 131, 135, 136.

The motion to direct a verdict, like a demurrer to the evidence, admits not only the facts stated therein but also every conclusion or inference which a jury might fairly or reasonably infer therefrom. Parks *v.* Ress, 11 How. 362. "Such a motion, like a demurrer to the evidence, admits not only what the testimony proves, but

what it tends to prove. The Ultimate facts, in other words, are admitted." Railroad Company *v.* Woodson, 134 U. S. 614, 621.

"We do not think, therefore, that it is a proper test of whether the court should direct a verdict, that the court on weighing the evidence, would, upon motion, grant a new trial. A judge might, under some circumstances, grant one new trial and refuse a second, or grant a second and refuse a third. In passing upon such motions he is necessarily required to weigh the evidence, that he may determine whether the verdict was one which might reasonably have been reached. But, in passing upon a motion to direct a verdict,
684 his functions are altogether different. In the latter case we think he cannot properly undertake to weigh the evidence. His duty is to take the view of the evidence most favorable to the party against whom it is moved to direct a verdict, and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party * * * We only wish to be understood as holding that whenever there is evidence of so positive and significant a character as, if uncontradicted, would support a verdict, it is the duty of the court to submit the case to the jury, under proper instructions. It is certainly not his function to weigh the evidence for the purpose of saying how the verdict should go." Railroad Company *v.* Lewery, 74 Fed. 463, 477.

The case should be submitted to the jury unless the conclusion follows, as a matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish. Dunlap *v.* Railroad Co. 130 U. S. 649.

The motion at the close of plaintiff's evidence, for a peremptory instruction for the company was properly denied. It could not have been allowed without usurpation, upon the part of the court, of the functions of the jury. Where the cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper instruction as to the principles of law involved. It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it." Insurance Co. *v.* Doster, 106 U. S. 30.

685 The rule is also expressed as follows: "If different minds might draw different conclusions or inferences from facts proved, the case should be left to the jury; and so, likewise, in the cases of doubt as to the proper inferences to be drawn." Railroad Company *v.* Stout, 84 U. S. 657; Railroad Company *v.* Ives, 144 *id.* 408, 417; Railroad Company *v.* Gentry, 163 *id.* 353, 368; Beatty *v.* Life Assn. 75 Fed. 65, 68.

A careful examination of the voluminous record in this cause satisfies me that there was evidence which, unexplained and undenied, tended to prove that Emma Danford exerted undue influence over the decedent in the execution of the will and codicils. It

certainly is clear that reasonable men might honestly differ in their view as to the effect of the facts proved and the inferences to be drawn therefrom. In my opinion it was impossible for the Circuit Judge to take the view of the evidence most favorable to the contestants, as the law demands he should, and direct a verdict for the proponents.

Notwithstanding the fact that the testimony relating to the exact time of the execution of the will and codicils fails to show any immediate present influence being exerted to control the mind and will of the decedent, I cannot overlook the fact that Emma Mullinger, when a girl of thirteen, after a few weeks' acquaintance with her uncle, the decedent, voluntarily left her home, father and mother and came to this far away land to live with him and from that time until his death was apparently very much attached to him and lost no opportunity to make a show of affection for him but as soon as he was dead permitted his body to be taken from her home, where he died, and the funeral services to be conducted from an undertaker's parlors; that she had an aversion for Charles Notley and his mother and that every prediction or threat made by her relative to the disposition of decedent's property was verified
686 by the terms of the will when published and that she had ample opportunity to exert undue influence over the decedent. These with other incidents showing a disposition on the part of the decedent to yield to the wish of Emma Danford in many matters certainly tend to support the theory of the contestants.

The contestants certainly had the right to demand that the evidence be submitted to the jury and to have their free and fair judgment thereon. The denial of that right and the direction of the verdict by the Circuit Judge was a clear usurpation of the functions of the jury.

While the trial judge has the undoubted right to take a cause from the jury and to direct a verdict in certain cases, this power should be exercised with great care and caution. Under our system of laws the jury are the constituted triers of the facts. When a party elects a trial by jury he has the right to demand the judgment of the jury on the facts. The trial judge is frequently called upon to act upon the spur of the moment, without sufficient opportunity to analyze or consider the testimony. This fact alone should induce him to give the party against whom the motion is directed the benefit of every reasonable doubt and not to take the case from the jury unless his duty to do so is clear.

I am convinced that it was error for the Circuit Judge to direct the verdict in this cause and that the exceptions ought to be sustained.

(S) C. A. GALBRAITH.

Endorsed: Supreme Court Territory of Hawaii In the Matter of the will of Chas. Notley, deceased,—Filed March 8, 1904—(S) George Lucas, Clerk.

687 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii, October Term A. D. 1903.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Motion by Contestants for Rehearing and Reargument.

The contestants, appellants herein, by their attorneys Kinney, McClanahan & Cooper and J. J. Dunne, move for a rehearing and re-argument of the above cause upon the following grounds;

1. That questions decisive of the case and duly submitted by counsel have been overlooked by this court in its decision herein.

2. That the decision of the court herein is in conflict with an express statute to which the attention of the court was not drawn, and which was overlooked by the court.

3. That the decision of the court herein is in conflict with controlling decisions of this court to which the attention of this court was not particularly drawn and which were overlooked by the court.

4. That points duly submitted by counsel and which might have been decisive of the case were overlooked by the court.

5. That the decision of this court was based mainly on a point not raised by the Bill of Exceptions herein and not argued by counsel.

And under and in ampli-cation of the foregoing grounds and in order that the same may be set forth in detail contestants ask a rehearing and re-argument of the particular grounds following:

That the evidence submitted to the Court herein was not considered by the court "in the light most favorable to the contestants," but in many instances in the light most unfavorable to the contestants, contrary to the law of the case as found by the court.

688 That the decision herein is in conflict with the law accepted by the court in this cause that the proponents must be considered as having admitted not only the facts which the contestants' evidence tends to establish, but also every inference which a jury might fairly draw from such evidence, in that the decision and record herein show conclusively that the court failed to apply the law last hereinabove recited to the facts.

That said decision is in conflict with the law repeatedly upheld by this court, (constituting controlling decisions herein) in holding that in a contested will case, a cause can be taken away from a jury in the absence of material and substantial evidence, which, if believed by the jury, would in law justify a verdict for the contestants. The court in so holding in this case having disregarded controlling decisions of the court that if the evidence presented to the jury against the validity of the will amounts to more than a scintilla of evidence, the case must go to the jury. Said controlling decisions including the matter of the will of Nalimu Naoiwi, reported Volume 14, Hawaiian Reports page 43.

That said decision is in conflict with the controlling decisions of this court to the effect that a case should not be withheld from the

jury where there is legal evidence tending to support the verdict. Said controlling decisions including the following:

In re Estate Nakuapa, 3 Haw. 143;
Forbes *v.* Gibson, 3 Haw. 258;
Wight *v.* Jones, 3 Haw. 755;
Welch *v.* Spencer, 4 Haw. 358;
Holelua *v.* Kapu, 4 Haw. 539;
Elikapeka *v.* O*O*kala S. Co. 4 Haw. 625;
Kapoohiwa *v.* Kaluaaha, 5 Haw. 25;
Lorsen *v.* Waterhouse, 7 Haw. 397;
Martin *v.* Kerr, 7 Haw. 346;
Sylva *v.* Kahuakai, 9 Haw. 431;
Kapuakela *v.* Iaea, 10 Haw. 99;
689 Byrne *v.* Voeller, 13 Haw. 494;
Tibbets *v.* Pali, 14 Haw. 517.

That in said decision and in the consideration of the Bill of Exceptions and the points raised thereby, the court disregarded controlling decisions of this court to the effect that where there is more than the scintilla of evidence, the case must be submitted to the jury, and the jury have a right to pass upon the same. Among said controlling decisions contestants name;

Smith *v.* Hamakua Mill Co. Vol. 14, Haw. Rep. page 669.

That in rendering said decision and in passing upon the Bill of Exceptions herein and the points raised thereunder, the court arrived at its conclusion by considering whether the circumstantial evidence of undue influence was of a "very clear and convincing character" or not, and that said decision was rendered against contestants because the court found that the circumstantial evidence of undue influence in the making of the will in question was not of a "very clear and convincing character." Whereas, contestants submit that under the many controlling decisions of this court, if there was more than a *scintilla* of evidence, the case should have gone to the jury Whether such evidence in the mind of the court was of a clear and convincing character or not.

In other words, contestants submit that under the decision herein, the court claimed and has exercised the right to consider the evidence herein from an erroneous standpoint in violation of controlling decisions including Smith *v.* Hamakua Mill Co., aforesaid, and in violation of Section 1355 of the Civil Laws (Ballou's compilation).

That the point upon which the decision herein turns, and without which said decision could not have been given, to wit, that
690 the evidence of undue influence was not of a very clear and convincing character was not raised in the Bill of Exceptions, nor submitted to the court in the argument of said Bill of Exceptions, to wit, the question whether the evidence of undue influence was of a very clear and convincing character. The exceptions in the trial court being to the motion of proponents of the will for a directed verdict on the ground that there was *no* evidence of undue influence.

That said decision is erroneous in that it has failed to consider

and pass upon the point raised in said Bill of Exceptions, to wit, whether or not there was *any* evidence of undue influence introduced by contestants in excess of a scintilla.

That under said decision the court overlooked and failed to consider Section 1355 of the Civil Laws, and Sections 1516, 1517 and 1518 of said Civil Laws, contestants not calling the attention of the court to the foregoing Sections because contestants argued the question whether there was more than a scintilla of evidence, not whether said evidence was of a very clear and convincing character as to undue influence.

That in rendering said decision and in passing upon the Bill of Exceptions and the points raised, thereunder, the court overlooked the provisions of the statute hereinabove referred to whereby no distinction can be made between issues of fact as to undue influence and any other issues of fact in the degree and amount of evidence required before the evidence can or will be submitted to the jury.

That said decision overlooked controlling decisions to the effect that the verdict of a jury in a contested will case against the will,
691 where the evidence of undue influence was weak and unsatisfactory and so found by the appellate court, would not be set aside, to wit, the case of Nalimu Naoiwi above cited.

That the evidence shows conclusively that there was more than a scintilla of evidence of undue influence exercised in the making of the will in question, and that therefore the ruling of the trial judge that there was no evidence at all of undue influence submitted at the trial by contestants was erroneous and the exceptions to such ruling should be allowed, and that the Appellate Court is not at liberty to pass upon the clearness or convincing character of the evidence at least until that question has been submitted to and passed upon by a trial judge if not by the jury.

That on the question whether the making of said will and codicils was consistent with any other theory than that of undue influence, the court erroneously considered, accepted and acted upon portions of the evidence favorable to proponent's views and unfavorable to contestants' views, when such portions of the evidence were in fact in dispute and contradictory to each other, and required the decision of the jury to determine what were the facts. In other words, there was evidence that decedent disinherited his son Charles Notley Jr., because of misconduct at Hilo in the year 1895, and there was also evidence tending to show that decedent did not disinherit said son for such cause but disinherited him because of quarrels between him and the niece Emma Danford occurring shortly before the making of the will, and contestants have a right that this issue should be passed upon by a jury, and charge that the court erred in standing upon the most unfavorable view of said evidence (from the standpoint of contestants) and say that if the evidence most favorable to Charles Notley Jr., on that point had been adopted by the court it would have left no other reasonable hypothesis for the disinheriting of said Charles Notley Jr., outside of undue influence exercised upon decedent as charged by contestants.

692 That by controlling decisions and statutes of this Territory if there is more than a scintilla of evidence in support of undue influence the clearness or the convincing character of such evidence must be in the first instance submitted to a jury, and must be passed upon by the trial judge before the Appellate Court can pass upon it.

That the court, in holding that the subsequent execution of the codicils to the will when such influence is not operative expressly confirming the will, makes it immaterial that the will itself was procured by undue influence if such were the fact, overlooked a controlling decision, to wit, the decision in the matter of the will of Nalimu Naoiwi where subsequent ratifications of a will held to have been obtained by undue influence were disregarded by this court in the absence of proof by those combatting undue influence that the undue influence had been removed, and was no longer being exercised.

In other words, the court failed to act upon the finding necessarily arrived at under Naoiwi case that undue influence when once established is presumed to continue until the contrary is shown by those denying such influence.

The entire record herein is referred to and hereby made a part of this motion.

Dated April 6th, A. D. 1904.

(S.) KINNEY, McCLANAHAN & COOPER,

(S.) J. J. DUNNE,

Attorneys for Contestants.

Endorsed: P. 3590 Supreme Court Territory of Hawaii. In the Matter of the Will of Charles Notley, Deceased. Motion by Contestants for Rehearing and Re-argument. Filed April 6, 1904 (S.) George Lucas, Clerk. Kinney, McClanahan & Cooper J. J. Dunne, att'ys for contestants.

693 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Motion for Rehearing.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Submitted May 16, 1904; Decided June 3, 1904.

FREAR, *C. J.*, GALBRAITH and PERRY, *JJ.*:

A rehearing should not be granted merely in order that the entire case may be presented again as at the first hearing in the hope that the court may be induced to come to a different conclusion.

Opinion of the Court by FREAR, *C. J.*:
(GALBRAITH, *J.*, dissenting.)

The court having held, ante, p. 435, that the trial judge did not err in directing a verdict for the proponents of a will and codicils, on the ground that there was no evidence upon which the jury could properly find for the contestants on the issue of undue influence, the contestants now move for a rehearing upon the following grounds:

1. That the decision is in conflict with an express statute to which the attention of the court was not drawn and which was overlooked by the court. The statute relied on is C. L., Sec. 1355, which provides, among other things, that juries shall be exclusive judges of the facts and that the trial judge shall not comment on the evidence. This statute was called to the attention of the court in contestants' brief, it was not overlooked by the court, and the decision is not in conflict with it. It does not prevent the trial judge from directing a verdict when there are no facts shown upon which the jury could properly base a verdict, and the provision as to commenting on the evidence, if it is constitutional (see Capital Traction Co. *v.* Hof. 174 U. S. 1), does not prohibit the direction of a verdict in a proper case.

694 2. That the decision is in conflict with controlling decisions of this court, to which the attention of the court was not particularly drawn and which were overlooked by the court. The decisions relied on are those which hold in substance that a case should not be withheld from the jury if there is any substantial evidence upon which a verdict could properly be based. Several of these cases were called to the attention of the court in the contestants' brief, they were not overlooked by the court, and the decision is not in conflict with them. The court could not have more clearly shown that it recognized the principle contended for than it did by its language, at page 438, in the decision. To hold that a case may properly be taken from the jury when there is no evidence is not in conflict with the view that a case should be left to the jury when there is evidence.

Whether the court failed to apply the principle which it enunciated will be considered under the next point.

3. That points submitted and decisive were overlooked and that the decision was based on a point not raised by the bill of exceptions and not argued by counsel. The contention is that the court, although it announced the principle just referred to, did not apply it but on the contrary considered the case as depending upon whether the evidence for the contestants was clear and convincing and not upon the question raised by the exceptions and argued, that is, whether there was any evidence upon which a verdict could properly be based. The decision, as we construe it, does not bear out this contention. The argument seems to be based largely upon several passages that were inserted in the decision, chiefly for completeness of statement or to avoid mis-impressions, but which did not form the basis of the decision. The correctness of these passages is not ques-

tioned but the contention is that the decision was based upon
695 them rather than upon the other main principles stated in the decision. For instance, the main contention is that the court proceeded on the theory that in order to justify leaving a case of this kind to the jury the evidence of undue influence must be "clear and convincing," whereas the court merely stated that circumstantial evidence alone of undue influence should be of a clear and convincing character, which is not disputed by the contestants, and this statement was made as a natural and usual qualification to a rule stated, in accordance with contestants' contention, that undue influence may be shown by circumstantial evidence. The court did not say that such evidence should be clear and convincing to the court in order to be left to a jury, but on the contrary stated in substance that if there was any material evidence it should be left to the jury, and the court proceeded on that theory. It stated the law and the evidence at some length—perhaps at unnecessary length—largely because of the nature of the question and of the conclusion and the elaborateness of counsel's argument, but concluded that, although there was sufficient evidence to justify a jury in finding a number of contestants' contentions, there was not sufficient to justify a jury in finding that the final disposition of the decedent's property was the result of undue influence. See p. 456. There was no direct evidence of undue influence. Indirect evidence had to be resorted to. The court expressed the view that the evidence might have justified a jury in finding that the presence and conduct of the one charged with exercising undue influence produced a decided change for the worse in the decedent's family, that she and the decedent were fond of each other and even that she had the disposition and opportunity to try to influence him in the matter of his will.

It then remained to show that she had the power, not only to
696 influence, but to unduly influence him. In order to show that, it was necessary to show that she had a general control over him. But not only did the uncontradicted evidence show affirmatively that he was a man of strong mind but there was no evidence tending to show that she had a general control over him. On the contrary the evidence tended to show that when they were of different desires or opinions she was the one to yield. It is immaterial how much evidence there was on other points provided there was no substantial evidence on one essential point. As stated in the decision mere influence or even bad influence is not undue influence within the meaning of the law of wills.

To grant a rehearing in this case would be to do so merely in order that the entire case might be presented again substantially as at the first hearing in the hope that the court might be induced to come to a different conclusion. That should not be done. Harbottle *v.* Rawlins, 11 Haw. 207, 209. Few, if any, cases have been presented to this court with greater thoroughness and earnestness than this case and there appears no sufficient reason for granting a rehearing.

The motion is denied.

Holmes & Stanley and C. Brown for proponents.

A. S. Hartwell; Kinney, McClanahan & Cooper and J. J. Dunne for contestants.

(S.) W. F. FREAR.
(S.) A. PERRY.

I respectfully dissent.
(S.) C. A. GALBRAITH.

Endorsed: Supreme Court Territory of Hawaii. In the Matter of the Will of Charles Notley, Deceased.—Decision on Motion for Rehearing. Filed June 3, 1904. (S.) George Lucas, Clerk.

697 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii, October Term, A. D. 1903.

In the Matter of the Will Controversy of CHARLES NOTLEY, Deceased.

Contestants' Second Motion for Rehearing.

Now come contestants herein and for a second time move that a re-hearing be had upon contestants' Bill of Exceptions herein and upon the opinion rendered herein by the Supreme Court in passing upon said Bill of Exceptions and upon the decision of the Supreme Court denying contestant's first motion for a rehearing, on the following grounds:

That contestants were led to believe and had a right to believe from the language of the decision of this Court in its decision upon contestants' exception to the ruling of the Trial Judge directing a verdict by the jury that the same was based upon the proposition that where a will was sought to be set aside on the ground of undue influence, and the proofs of such undue influence are circumstantial and not direct that the evidence must be clear and convincing or the Court will be justified in refusing to allow the case to go to the jury;

That the decision by this Court on the first motion for re-hearing that the reference in the original opinion of the Court to the necessity for clear and convincing evidence was not applied by the Court or relied upon by the Court in determining that the Trial Judge properly directed the jury to return a verdict for proponents of the will, has come and rightly come as a surprise to contestants' counsel.

That the first motion for re-hearing was based substantially upon the contention that the Court erred in considering at all whether the evidence was clear and convincing or not, and that
698 the language of the Court in its original opinion upon the Bill of Exceptions was such as to justify counsel for con-

testants in basing their motion for re-hearing on that theory; and now that the Supreme Court has disclaimed any such intention by the language used in its original opinion counsel desire to be heard on the finding of the Court made on contestants' first motion for re-hearing that there was no evidence of a general controlling influence by Emma Danford over decendent; contestants claiming that they had a right to assume, until the Court in denying the first motion for re-hearing otherwise indicated, that the Court in its original opinion had not decided that there was no evidence of such a general controlling influence by said Emma Danford over decedent;

That the reference by the Court in its original opinion to the necessity of clear and convincing evidence was such and couched in such language that contestants are entirely excusable for having framed their first motion for re-hearing on that theory and for having concentrated their efforts thereon.

And contestants are further justified by the language used by the Court in its original opinion in holding the position they do that the Supreme Court in its decision on contestants' first motion for re-hearing has for the first time passed upon the issue whether or not there was any evidence of a general controlling influence by Emma Danford over decedent, and to such finding and decision for the first time clearly enunciated as contestants contend in the decision over-ruling contestants' first motion for re-hearing. Contestants except and

These contestants ask now for a re-hearing on that point on the ground that such finding by the Court is a palpable error and a grievous wrong to these contestants.

699 Contestants ask further for a re-hearing of the decision by the Supreme Court to the effect that motion for re-hearing should not be made or entertained if made merely with the hope that by a re-argument upon the same issue the mind of the Court may be changed. Such decision of the Court being contrary to controlling decisions on that point and not having been raised or argued at the hearing of contestants' first motion for a re-hearing.

(S'g'd) KINNEY, McCLANAHAN & COOPER AND
(S'g'd) J. J. DUNNE,
Att'ys for Contestants.

Honolulu, June 14th, A. D. 1904.

Endorsed: P. 3590 Supreme Court Territory of Hawaii. In the Matter of the Will of Charles Notley, Deceased. Contestants' Second Motion for Rehearing. Filed June 15, 1904. (S.) George Lucas, Clerk. Kinney, McClanahan & Copper Judd Building.

700 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Second Motion for Rehearing.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Submitted July 20, 1904; Decided August 2, 1904.

FREAR, *C. J.*, HATCH, *J.*, and Circuit Judge DEBOLT, in Place of HARTWELL, *J.*:

Rehearing—denied, no palpable error shown.

A rehearing should not be granted merely that the case may be presented again as at the first hearing in the hope that the court may be induced to come to a different conclusion, and in the absence of a showing of palpable error or grievous wrong.

Opinion of the Court by FREAR, *C. J.*:

The will and codicils were admitted to probate by a Circuit Judge at Chambers. On contestants' appeal to the Circuit Court on the issue of undue influence, a different Judge presiding, a verdict was directed for the proponents on the ground that there was no evidence of undue influence that could properly be submitted to the jury. On contestants' exceptions, this court sustained the direct verdict. 15 Haw. 435.

Contestants then moved for a rehearing, their principal contention being that the court in holding that there was not sufficient evidence of undue influence to go to the jury, did so on the erroneous theory that in order that indirect or circumstantial evidence of undue influence (that being the character of the evidence relied on) should be submitted to the jury, it should be of a nature clear and convincing to the court, whereas the court should have proceeded on the theory that the jury were the sole judges as to whether the evidence was clear and convincing and that the court should have acted on the theory that any evidence more than a scintilla would be sufficient. The court denied the motion for a rehearing, holding that the original decision did not bear out the contestants' contention as to the construction of that decision; that the court in that decision proceeded on the theory that the evidence
701 should be submitted to the jury, whether it was clear and convincing to the court or not, if there was any material evidence upon which a verdict could properly be based; that to grant a rehearing in the case would be to do so merely in order that the entire case might be presented again substantially as at the first hearing in the hope that the court might be induced to come to a different conclusion; that that should not be done; that few if any cases had been presented to the court with greater thoroughness and earnestness than this case, and that there appeared no sufficient reason for granting a rehearing. 15 Haw. 700.

The contestants now move a second time for a rehearing, accepting

the statement of the court as to its construction of the original decision, but contending that they were justified in placing upon that decision the construction which they relied on in their first motion for a rehearing and that this fact together with their claim that the original decision was a "palpable error and grievous wrong" is sufficient justification for their filing this second motion for a rehearing, and that they should now be granted a rehearing in order that they may show that there was sufficient evidence to go to the jury.

It is obvious from the foregoing that there are several preliminary questions that invite consideration and perhaps decision, but we will pass them without further notice. For it remains true, as was stated in the decision on the first motion, that this matter was presented with unusual thoroughness and earnestness at the original hearing and that to grant a rehearing would be to do so merely that the case might be presented again substantially as at that hearing in the hope that the court might be induced to come to a different conclusion, and we may add now that no sufficient showing has been made that the original decision was a "palpable error and grievous wrong" —
which is the chief claim relied on to justify this second
702 motion for a rehearing.

The motion is denied.

Holmes & Stanley and Cecil Brown for proponents.

Kinney, McClanahan & Cooper and J. J. Dunne for contestants.

(S.) W. F. FREAR.
(S.) F. M. HATCH.
(S.) J. T. DE BOLT.

Endorsed: Supreme Court Territory of Hawaii. In the Matter of the Will of Charles Notley, deceased.—Decision on Second Motion for Rehearing.—Filed August 2, 1904 (S) George Lucas, Clerk.

703 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Summons and Severance.

To David F. Notley:

You are hereby invited to join with us on or before the 18th day of April, 1906, to prosecute a Writ of Error in the above entitled cause wherein Cecil Brown and Anthony Lidgate were proponents of the alleged will of said Charles Notley, deceased, and William Notley, Charles Notley, Maria Hughes and David F. Notley were contestants, and John Notley, Victoria M. K. Notley, Lily Notley and William Notley, minors by W. S. Wise guardian *ad litem*, appeared as parties of record, and Emma Danford, one of the beneficiaries under said alleged will, appeared as a party of record, from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii

to reverse the judgment in the above entitled cause rendered against you and us, the said contestants, on the 8th day of March, 1904, a motion for re-hearing having been heard and considered and having been denied on the 3rd day of June, 1904, or you will be deemed to have acquiesced in the said judgment and we shall prosecute said Writ of Error without joining you as a party.

WILLIAM NOTLEY,
CHARLES NOTLEY, AND
MARIA HUGHES,
(S.) By Their Attorneys, KINNEY, McCLANAHAN & COOPER,
(S.) BALLOU & MARX.

Honolulu, April 16, 1906.

Service of the above is accepted this 18th day of April, A. D. 1906.

DAVID F. NOTLEY,
(S.) By His Attorneys, W. S. FLEMING & E. C. PETERS.

Endorsed: L. 6331—Supreme Court of the Territory of Hawaii—In the matter of the will of Charles Notley, deceased. Summons and Severance—Filed April 18, 1906—(S) George Lucas, clerk—Ballou & Marx, 303 Stangenwald Building, Honolulu, attorneys for William Notley, C. Notley and Maria Hughes. (Office No. —.)

704 [Stamped:] Supreme Court, Territory Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Refusal to Join in Writ of Error.

Now comes David F. Notley, one of the contestants in the above entitled cause wherein Cecil Brown and Anthony Lidgate were proponents of the alleged will of said Charles Notley, deceased, and John Notley, Victoria M. K. Notley, Lily Notley and William Notley, minors by W. S. Wise, guardian *ad litem,* appeared as parties of record and Emma Danford, one of the beneficiaries under said alleged will, appeared as a party of record, and refuses to join with William Notley, Charles Notley and Maria Hughes, his fellow contestants in prosecuting a Writ of Error fro- the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii as invited in the "Summons and Severance" filed herein on the 18th day of April, 1906, by his said fellow contestants, to reverse the judgment in the above entitled cause rendered against the said fellow contestants and himself on the 8th day of March, 1904, a motion for rehearing having been heard and considered and having been denied on the 3rd day of June, 1904.

DAVID F. NOTLEY,
(S.) By His Attorneys, W. S. FLEMING & E. C. PETERS.

Honolulu, April 18th, 1906.

Endorsed: L. 6331—Supreme Court of the Territory of Hawaii—In the matter of the will of Charles Notley, deceased—Refusal to join in writ of error—Filed April 18, 1906 (S) George Lucas, clerk—W. S. Fleming & E. C. Peters, attorneys for David F. Notley, Honolulu (office No. —.)

705 [Stamped:] Supreme Court, Territory Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Certificate by Chief Justice.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Walter F. Frear, Chief Justice of the Supreme Court of the Territory of Hawaii, do hereby certify that on or about April 23, 1906, William Notley, Charles Notley and Maria Hughes, by their attorneys, made an application to me to allow a Writ of Error from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii in the above entitled cause, and that I denied the said application.

In testimony whereof I have hereunto set my hand at Honolulu this 22nd day of June, A. D. 1906.

(S.) W. F. FREAR,
Chief Justice of the Supreme Court of the Territory of Hawaii.

Endorsed: Supreme Court Territory of Hawaii In the Matter of the Will of Charles Notley, deceased. Certificate by Chief Justice Filed June 22nd, 1906 at 1:40 P. M. (S) J. A. Thompson, Clerk. Ballou & Marx, 303 Stangenwald Building, Honolulu, Attorneys for ——. (Office No. —.)

706 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES, and DAVID F. NOTLEY

v.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, their Guardian *ad litem*, and EMMA DANFORD.

Error to Circuit Court, Fourth Circuit.

Argued March 22, 1906; Decided April 13, 1906.

FREAR, *C. J.*, HARTWELL and WILDER, *JJ.*:

Writ of Error—Rendition of Judgment.

Whether under the statutory provision that writs of error may only be had within six months from rendition of judgment "rendition" should be construed to mean "entry" is not decided *Id.*—Questions previously decided on exceptions.

A writ of error bringing up questions already decided by this court on exceptions in the same case will on motion be dismissed. Only proceedings subsequent to and not in conformity with the decision on the exceptions may be reviewed afterwards on error.

Appeals to United States Supreme Court.

This Court decides questions as if its judgment was to be final and conclusive, and it should neither accelerate nor retard appeals from its decisions.

707 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Opinion of the Court by WILDER, *J.*:
(Hartwell J., Dissenting.)

This is a motion to quash the writ of error on the grounds (1) that the writ was not issued within six months from the "rendition of judgment," (R. L. Sec. 1869,) and (2) that all the errors assigned have been heretofore decided by this Court in 15 Haw. 435, 700; 16 Haw. 66.

It is claimed by defendants in error that the judgment herein was rendered and filed on January 29, 1903. On that day the presiding judge signed and filed the following "Order for entering up judgment:" "It is hereby ordered that the clerk of this court do sign

and enter up judgment in favor of proponents of the last will and testament of Charles Notley, deceased, in accordance with said verdict, and the decree admitting said will and codicils to probate is hereby affirmed. Done in open court at Hilo this 28th day of January, 1903." On January 29, 1903, a judgment in accordance with said order was filed bearing the following endorsement of the clerk: "Filed January 29, 1903. Daniel Porter, clerk." This judgment was not signed at the end by any one. On June 8, 1905, plaintiffs in error filed a motion to set aside the order of January 29, 1903, above quoted, which motion was denied on August 28, 1905. On June 8, 1905, defendants in error moved that the clerk be ordered to sign the judgment which had been filed on January 29, 1903. This motion was granted without prejudice to the motion of plaintiffs in error, and the judgment was signed on the same day as of the 28th day of January, 1903. No objection is made to the form of the judgment.

There is considerable force in the contention of the defendants in error that the judgment herein was rendered on January 28, 1903. A writ of error can only be had within six months from the
708 "rendition of judgment." Sec. 1869, R. L. "Rendition" and "entry" of judgment have been used more or less interchangeably by this court in some of the past cases. The terms "rendition" and "entry" were correctly used in Kapepee *v.* Kupahi, 16 Haw. 799, where, in a jury waived case, it is stated that judgment was rendered at the close of the trial and was entered some days thereafter. It is contended by the plaintiffs in error that the past construction by this court of the writ of error statute has been to regard rendition as meaing entry, but that, if that is not so, it should only be laid down as a rule for future guidance and the writ should not be quashed on this ground. As the other ground of the motion is decisive of the matter, the decision will be based on that ground.

The second ground for quashing the writ is that all the errors assigned have been heretofore decided by this court. There is no question but that the first five assignments of error have been disposed of by this court. The other assignments of error have reference to the order of January 29, 1903, and the proceedings subsequent to the over-ruling of the exceptions, all of which are referred to above. As already pointed out it is at least an open question whether these subsequent proceedings were necessary, but if they were the action of the trial court in each instance was in exact compliance with the opinion of this court on the overruling of the exceptions. See 15 Haw. 435, 700; 16 Haw. 66. This court said in Meheula *v.* Pioneer Mill Company, 17 Haw. 94, that "if no judgment was entered on the verdict it is entered by the circuit court upon notice of the overruling of the exceptions. This result follows as a matter of law."

Error and exceptions are concurrent methods for the correcting of errors made in the trial of law cases in the circuit courts, the conditions and limitations of each method being different. Cummings *v.* Iaukea, 10 Haw. 4.

709 In Ferreira *v.* H. R. T. & L. Co., 16 Haw. 406, it was held that where a party has brought a bill of exceptions to this court and has also sued out a writ of error covering the same matters

he will be obliged to elect which procedure he will follow. The Court said on page 408: "Though the remedies are concurrent it does not follow that the party is entitled to both of said remedies at the same time any more than he would be entitled to maintain two actions for the same cause in courts of concurrent jurisdiction."

That being so, it would seem to follow that a party after pursuing one remedy to termination, namely, by exceptions, could not thereafter pursue the other remedy, namely, writ of error, to determine exactly the same questions. It would be like an appeal or writ of error from this court to this court. If this could be done there would be no end to litigation and appeals, and the courts themselves might be turned into instruments of injustice by an obstinate litigant. This is the inference to be drawn from the language of this court in Cummings *v.* Iaukea, *supra*, where it is said that "undoubtedly if the ground of error in the cause had been made matter of exception and had been decided in the supreme court, error would not lie."

This view is sound on principle and has the support of the United States Supreme Court, to say nothing of the courts of the different states.

It is well settled that the second writ of error brings up nothing for revision except the proceedings subsequent to the mandate; and it follows that, if those proceedings are merely such as the mandate commanded and were necessary to the execution of the mandate, the writ will be dismissed, as any other rule would enable the losing party to delay the execution of the mandate indefinitely, which cannot be permitted. Cook *v.* Burnley, 11 Wall. 677.

710 An appeal from a decree which the circuit court passed in exact accordance with the mandate of this court upon a previous appeal will upon motion of the appellee be dismissed with costs. Stewart *v.* Salaman, 97 U. S. 361. See also Humphrey *v.* Baker 103 U. S. 736; Aspen Co. *v.* Billings, 150 U. S. 31.

In Hartshorne *v.* Sleight, 3 Johns (N. Y.) 554, where a second writ of error bringing up errors previously decided in the same case was quashed, it was said (p. 563): "The decision heretofore made in this case, so far as it establishes a general principle, is the law of the land. So far as it is confined exclusively to the parties, it is *the law of the case*, and can never be called in question, or examined in any court of this state. In quashing this writ, we declare it a nullity; we declare that it ought not to have been issued; and we declare, that after having deliberately considered and solemnly adjudged the controversy before us, we will not permit a round of vexatious litigation and an accumulation of unnecessary expense."

We have examined all the citations of plaintiffs in error and find that they are not in point.

Counsel for plaintiffs in error seem to think that, unless this court entertains jurisdiction and affirms the judgment of the lower court, the questions decided by this court on the bill of exceptions cannot be reviewed by the Supreme Court of the United States. On that point reference is made to the case of Gregory *v.* McVeigh, 23 Wall. 294. That was a case from Virginia, where "the Supreme Court of Appeals is the highest court of the state. Judgments of the Cor-

poration Court of Alexandria can only be taken there for review on leave of the Court of Appeals itself or some judge thereof. Gregory, against whom a judgment had been rendered in the Corporation Court, applied to each and every one of the judges of the
711 Court of Appeals for a writ of error but his applications were all rejected because the judgment was 'plainly right.' This, by a statute of Virginia, was a bar to any application to the court for the same purpose, and Gregory thereupon sued out a writ of error from this court to the Corporation Court, as the highest court of the state in which a decision in the suit could be had. Upon a motion to dismiss we upheld our jurisdiction, because everything had been done that could be to take the case to the Court of Appeals, and its doors had 'been forever closed against the suit, not through neglect, but in the regular order of proceeding under the law governing the practice.' Had the court itself refused the leave upon an application for that purpose, its refusal would have been equivalent to a judgment of affirmance, which could have been reviewed in this court; but as in the regular course of proceeding that had been done which prevented either a review of a judgment of the Court of Appeals or an application to that court for a writ of error, the judgment of the Corporation Court had become the judgment of the highest court of the state in which a decision in that suit could be had, and consequently was reviewable here as such." Fisher *v.* Perkins, 122 U. S. 526.

But in any event that question does not concern this court. This court, except where the matter is controlled by the decision of a higher court, must decide questions coming before it as if no revisionary tribunal existed, and as if its judgment was to be final and conclusive. It should neither accelerate nor retard appeals from its decisions. See Hartshorne *v.* Sleight, *supra.*

It was suggested that the plaintiffs in error, after the verdict of the jury had been rendered and exceptions thereto had been overruled by this court, might have set up other grounds for re-
712 sisting the probate of the will, but no such other grounds are set forth, and, in the absence of such a showing, we cannot assume that there were any, even if they could have been set up.

The judgment of this court is that the motion to quash the writ should be granted, and accordingly the writ is dismissed.

S. M. Ballou (Ballou & Marx on the brief) (S.) W. F. Frear for plaintiffs in error.

W. L. Stanley (Holmes & Stanley on the brief) (S.) A. A. Wilder for defendants in error.

713 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

Dissenting Opinion of HARTWELL, *J.*:

The first ground of the motion to quash is that this court has "already decided the questions now sought to be reviewed" and the second that the writ was not issued within six months from rendition of judgment, namely, January 29, 1903. The opinion of the

court considers these grounds in the reverse order named in the motion.

I think that the motion cannot be granted on either of the grounds named. The judgment was not rendered in such form that a writ of error would lie to it until June 8, 1905. A judgment cannot be made 'as of' an earlier date than it was actually made for the purpose of shortening the time in which a writ of error can be taken out. Rubber Co. *v.* Goodyear, 6 Wall, 156. The only object of a *nunc pro tunc* judgment is "to see that the parties shall not suffer by the delay." Mitchell *v.* Overman, 103 U. S. 65. It "should be granted or refused as justice may require in view of the circumstances of the particular case." *Ib.*

All of the questions sought to be reviewed by the writ of error were not passed upon by the decision upon the exceptions. The rulings which were not passed upon were those made by the circuit court, after the allowance of the bill of exceptions, in denying the contestants' motion to set aside the order of the circuit judge filed January 29, 1903, affirming the decree of Judge Little admitting the will to probate and granting the proponent's motion that the clerk be ordered to sign the judgment in conformity with the order of the judge of January 28, 1903. The exceptions taken by the contestants, allowed and signed by the presiding judge June 8, 1905, are as follows:

"Contestants except to the allowance of proponent's motion that the Clerk of Court be ordered to sign the form of judgment filed January 29th, 1903, and to the judgment so signed on the ground that such allowance is illegal, null and void and not justified by the law or evidence or record herein and to the judgment upon the ground that said judgment is contrary to the law and evidence and weight of evidence and without authority of law and is illegal, null and void."

714 Upon these exceptions there has been no ruling thus far by this court.

The right of the Circuit Court to affirm the decree of the circuit judge in probate appears to me to require serious consideration, and so of the proper form of judgment when issues of fact are tried by jury upon appeal from a probate decree.

The right of appeal from a decree of a circuit judge at chambers to the circuit court is not expressly granted, although clearly recognized by statute. This is a result, it must be conceded, of defective legislation. Circuit courts formerly consisted of the judge of the circuit associated on the bench with a justice of the supreme court who presided at the term. At a later date the first circuit court was held by a justice of the supreme court, the office of the circuit judge of that circuit being abolished. By the Judiciary Act of 1892 the circuit courts were held by the circuit judges. The jurisdiction of the supreme court being mainly appellate, and appeals lying to the supreme court from all decisions and decrees of the circuit judges at chambers "except in cases in which the appellant is entitled to appeal to a jury," and with the proviso that "in any case in which the law allows an appeal from the decision, judgment, order or de-

cree of a judge in chambers to be tried before a jury" the judge appealed from "shall not preside at the trial of such appeal before a jury," but a circuit judge from some other circuit. Sec. 1859, R. L. The only cases in which the appellant could have a jury trial were the probate cases enumerated in the act of 1864 (sec. 1843, R. L.) namely, in estates of over $500 and upon issues of fact upon which either the appellant or appellee should move the appellate court for a jury trial. Writs of error to the supreme court lay from any decision of a police justice, circuit judge or circuit court or any justice of the supreme court, which, after hearing the case, was authorized by statute "to give judgment either affirming or reversing or modifying the former judgment or remanding the cause for a new trial." Sec. 1159, Civ. Code, 1859. Under the act of 1892 (sec. 1860, R. L.) in cases of appeals from decisions of a circuit judge, the supreme court "shall have power to review, reverse, affirm, amend, modify or remand for a new hearing." Sec. 1860 *Ib.* In the various changes in the procedure made by the legislature the right of appeal from a circuit judge to the circuit court was not retained, although the statute concerning the trial of issues of fact by a jury upon an appeal being taken from a probate decree of a circuit judge to the circuit court was retained, applying in cases of estates of over $500 in value.

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It is difficult to say that under the statute an appeal from a probate decree goes any further than the trial by jury of specified issues of fact or that an appeal could be allowed at all except for the trial of such issues. I therefore think that in this case the circuit court had no authority by statute or under any implied power to pronounce a judgment affirming the decree of the circuit judge in probate admitting the will to probate. Power to affirm implies power to reverse. If the findings of the jury had been adverse to the appellant judgment would properly have been made which was applicable to those findings. If the judgment had been in favor of the contestants they could then move the circuit judge, on notice of it, to reverse his decree, and so upon a judgment in favor of the proponent he could move the circuit judge to affirm his decree. This seems to me to be the correct practice.

I therefore feel compelled to dissent from the decision of the court upon the motion to quash.

(S.) ALFRED S. HARTWELL.

716

Endorsed: Supreme Court, Territory of Hawaii, William Notley *et al., v.* C. Brown *et al.* Decision. Filed April 13, 1906. (S.) George Lucas, Clerk.

717 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii.

WILLIAM NOTLEY, CHARLES NOTLEY, and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, their Guardian *ad litem*, and EMMA DANFORD, Defendants in Error.

Præcipe Designating Parts of Record to be Included in Transcript.

To Henry Smith, clerk of the supreme court of the Territory of Hawaii:

You are requested to make a transcript of the record in the Supreme Court of the Territory of Hawaii in the cause entitled "In the Matter of the Will of Charles Notley, deceased," to be filed in the Supreme Court of the United States, pursuant to a Writ of Error allowed in said cause, and to include in such transcript of record the following and no other papers and exhibits, to wit:

1. Petition for probate of the will of Charles Notley, deceased, and codicils thereto, signed by Cecil Brown and Anthony Lidgate.
2. Will of Charles Notley, deceased.
3. First codicil thereto.
4. Second codicil thereto.
5. Appearance of Charles Notley and others, contestants.
6. Decree of Judge Little dated September 19, 1902, admitting will to probate.
7. Appeal by contestants from said decree.
8. Transcript of the evidence of Daniel Porter, Doctor George Herbert, Cecil Brown, J. W. Leonhart, Frank F. Fernandes
718 and Anthony Lidgate, given at Chambers in probate.
9. Clerk's minutes of proceedings in the Circuit Court of the Fourth Circuit on Appeal.
10. Motion for trial of issues of fact before a jury.
11. Order granting said motion.
12. Stenographers' transcript of evidence, proceedings, orders, rulings, proponents' motion to direct verdict, order granting motion, charge to jury, verdict of the jury, given and had in the Circuit Court of the Fourth Circuit on Appeal.
13. Contestants' Exhibits 1 to 19 inclusive.
14. Motion and order appointing W. S. Wise guardian *ad litem* of the minor children of Charles Notley, Junior.
15. Order of judge Robinson dated January 28th, 1903, instructing Clerk to enter up judgment.
16. Judgment filed January 29, 1903, (Signed June 8, 1905).

17. Bill of Exceptions of present plaintiffs in error to Supreme Court of the Territory of Hawaii.
18. Decision of said Supreme Court rendered March 8, 1904.
19. Contestants' first motion for re-hearing.
20. Decision of said Supreme Court on motion for re-hearing rendered June 3, 1904.
21. Contestants' second motion for re-hearing.
22. Decision of said Supreme Court on second motion for re-hearing rendered August 2, 1904.
23. Summons and Severance of David F. Notley.
24. Refusal by David F. Notley to join in Writ of Error.
25. Certificate by Chief Justice Frear of denial of application for allowance of Writ of Error.
26. Decision of said Supreme Court in the case entitled "William Notley *et al. v.* Cecil Brown *et al.*," rendered and filed April 13, 1906.

Respectfully,

BALLOU & MARX,
J. J. DUNNE,
Attorneys for Plaintiffs in Error.

719 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the United States, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY, and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of CHARLES NOTLEY, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, their Guardian *ad litem*, and EMMA DANFORD, Defendants in Error.

Citation to Defendants in Error.

The United States of America to Cecil Brown and Anthony Lidgate, proponents of the will of Charles Notley, deceased; John Notley, a minor; Victoria M. K. Notley, a minor; Lily Notley, a minor, and William Notley, a minor, by W. S. Wise, their guardian *ad litem*, and Emma Danford, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington in the District of Columbia within sixty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, wherein William Notley, Charles Notley and Maria Hughes are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Joseph McKenna, Justice of the Supreme Court of the United States, the 28th day of May in the year of our Lord one thousand nine hundred and six.

JOSEPH McKENNA,
Justice of the Supreme Court of the United States.

Service of the above citation accepted and copy received this 14th day of June, 1906.

HOLMES & STANLEY,
Attorneys for Cecil Brown, Anthony Lidgate and Emma Danford, defendants in error.

Service of the above Citation accepted and copy received this 18th day of June, 1906.

W. S. WISE,
Guardian ad Litem, Defendant in Error, In Propria Persona.

720 [Endorsed:] Supreme Court of the United States. William Notley *et al.*, Plaintiffs in Error, *vs.* Cecil Brown *et al.*, Defendants in Error. Citation. Filed in the Supreme Court of the Territory of Hawaii June 22nd, 1906, at 10 A. M. W. P. Scott, Clerk. Ballou & Marx, 303 Stangenwald B'ld'g, Honolulu, Attorneys for Pl't'fs in Error. (Office No. —.)

721 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the United States, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY, and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of CHARLES NOTLEY, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, their Guardian *ad litem*, and EMMA DANFORD, Defendants in Error.

Writ of Error to the Supreme Court of the Territory of Hawaii.

UNITED STATES OF AMERICA, *ss.:*

The President of the United States of America to the honorable judges of the supreme court of the Territory of Hawaii, Greeting:

Because in the record and proceedings as also in rendition of the final judgment or decree which is in the said Supreme Court of the Territory of Hawaii before you or some of you, being the highest Court of law or equity of the said Territory in which a decision could be had in the above entitled cause, said cause being entitled in said

Court, "In the Matter of the Will of Charles Notley, deceased," wherein Cecil Brown and Anthony Lidgate were proponents of the alleged will of said Charles Notley, deceased; and William Notley, Charles Notley, Maria Hughes and David F. Notley were contestants; and John Notley, Victoria M. K. Notley, Lily Notley and William Notley, minors, by W. S. Wise, guardian *ad litem*, appeared as parties of record, and Emma Danford, one of the beneficiaries under said alleged will, appeared as a party of record, in which the amount involved exclusive of costs, exceeded the sum or value of Five Thousand Dollars ($5000.) a manifest error hath happened to the
722 great damage of the said William Notley, Charles Notley and Maria Hughes, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same at Washington within sixty days from the date hereof, in the said Supreme Court, to be then and there heard, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of May in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court
of the United States.

723 [Endorsed:] Supreme Court of the United States. William Notley *et al.*, Plaintiffs in Error, *vs.* Cecil Brown *et al.*, Defendants in Error. Writ of Error. (Original.) Filed in the Supreme Court of the Territory of Hawaii, June 14th, 1906, at 4 P. M. W. P. Scott, Clerk. Ballou & Marx, 303 Stangenwald B'ld'g, Honolulu, Attorneys for Pl't'fs in Error. (Office No. —.)

724 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the United States, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY, and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, their Guardian *ad litem*, and EMMA DANFORD, Defendants in Error.

Petition for Writ of Error to the Supreme Court of the Territory of Hawaii.

Now come William Notley, Charles Notley and Maria Hughes, plaintiffs in error, and say

That on the 8th day of March 1904 the Supreme Court of the Territory of Hawaii entered a final judgment in the above entitled cause in favor of the present defendants in error and against these plaintiffs in error and one David F. Notley, said cause being entitled in said Court, "In the Matter of the Will of Charles Notley, deceased," wherein Cecil Brown and Anthony Lidgate were proponents of the alleged will of said Charles Notley, deceased; and William Notley, Charles Notley, Maria Hughes and David F. Notley were contestants; and John Notley, Victoria M. K. Notley, Lily Notley and William Notley, minors by W. S. Wise, guardian *ad litem*, appeared as parties of record and Emma Danford, one of the beneficiaries under said alleged will appeared as a party of record; in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of these plaintiffs in error, all of which will in more detail appear from the assignment of errors which is filed with this petition.

725 That a motion for re-hearing in said cause was duly presented by these plaintiffs in error and was entertained and considered by said Supreme Court of the Territory of Hawaii, and was denied on the 3rd day of June, 1904; that a second motion for re-hearing in said cause was duly presented by these plaintiffs in error and was entertained and considered by said Supreme Court of the Territory of Hawaii and was denied on the second day of August, 1904.

That said David F. Notley was duly invited by "Summons and Severance" filed in said cause to join these plaintiffs in error in prosecuting a Writ of Error in said cause from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii and for answer filed a "Refusal to Join in Writ of Error."

That the said Supreme Court of the Territory of Hawaii is the highest Court of the said Territory of Hawaii in which a decision in this suit and this matter could be had and that the amount in-

volved exclusive of cost exceeded the sum or value of Five Thousand Dollars.

Wherefore these plaintiffs in error pray that a Writ of Error may issue in this behalf out of the Supreme Court of the United States allowed by a Justice thereof for the correction of errors so complained of and that the transcript of the record proceedings and papers in this cause duly authenticated may be sent to the Supreme Court of the United States.

Honolulu, April 24, 1906.

(S.)
(S.)

SIDNEY M. BALLOU,
J. J. DUNNE,
Attorneys for Plaintiffs in Error.

726 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the United States, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY, and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, their Guardian *ad litem*, and EMMA DANFORD, Defendants in Error.

Assignment of Errors.

Now come William Notley, Charles Notley and Maria Hughes, plaintiffs in error in the above entitled cause and respectfully submit,

That in the record proceedings, decision and final judgment of the Supreme Court of the Territory of Hawaii, in the cause entitled in said Court, "In the Matter of the Will of Charles Notley, deceased," wherein Cecil Brown and Anthony Lidgate were proponents of the alleged will of said Charles Notley, deceased, and William Notley, Charles Notley and Maria Hughes and David F. Notley were contestants and John Notley, Victoria M. K. Notley, Lily Notley and William Notley, minors by W. S. Wise, guardian *ad litem*, appeared as parties of record, and Emma Danford, one of the beneficiaries under said alleged will, appeared as a party of record; on which final judgment of said Supreme Court of the Territory of Hawaii was entered on the 8th day of March, 1904, a motion for re-hearing being duly presented and being considered by said Supreme Court and being denied on the third day of June, 1904, and a second motion for re-hearing being duly presented and being considered by said Supreme Court and being denied on the second day of August, 1904, the said William Notley, Charles Notley and Maria Hughes, having obtained a Writ of Error upon
727 said judgment of said Supreme Court of the Territory of Hawaii returnable within sixty days after the date of the said

Writ of Error to the Supreme Court of the United States at Washington in the District of Columbia, assign for error in the record and judgment aforesaid the following, to wit:

First. That the said Supreme Court of the Territory of Hawaii erred in deciding upon a bill of exceptions duly taken by the present plaintiffs in error and allowed to certain rulings of the Circuit Court for the Fourth Judicial Circuit of the Territory of Hawaii in and upon the trial of said cause, that upon the closing of the case of the contestants of the said will, the present plaintiffs in error, a verdict was properly directed and thereupon rendered for the proponents of the said will, the present defendants in error by said Circuit Court in said cause.

Second. That the said Supreme Court of the Territory of Hawaii erred in deciding upon the said bill of exceptions that upon the closing of the case of the contestants of the said will, the present plaintiffs in error, the jury was properly instructed by said Circuit Court in the said cause, to find that the said will was not executed and published under or by virtue of undue influence exercised by the aforesaid Emma Danford on Charles Notley, the said testator.

Third. That the said Supreme Court of the Territory of Hawaii erred in deciding upon the said bill of exceptions that upon the closing of the case of the contestants of said will, the present plaintiffs in error, the jury was properly instructed by the said Circuit Court in said cause to bring in a verdict in form as follows:

"In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

Judge W. J. Robinson, Presiding.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

728 We the jury in the above entitled cause find for the proponents, and to the first question of fact submitted to us answer and say, that the will and codicils dated respectively May 18, 1899; August 2, 1900; and April 11, 1902, are the last will and codicils of Charles Notley, deceased, and in answer to the second question of fact submitted, answer, say and find that said will and codicils were not executed by, under or by virtue of undue influence exercised by Emma Danford at the time of the execution and publishing by said Charles Notley, deceased, of said will and codicils thereto.

(Signed) —— ——, *Foreman.*

Hilo, Hawaii, Territory of Hawaii, January 28th, A. D. 1903."

Fourth. That the said Supreme Court of the Territory of Hawaii erred in that the said cause having been remanded to the Circuit Court of the Fourth Circuit of the Territory of Hawaii after the aforesaid judgment of the Supreme Court and further proceedings having been taken in said cause in said Circuit Court and a Writ of

Error dated November 25, 1905, in said cause, having been thereafter sued out by the present plaintiffs in error from the Supreme Court of the Territory of Hawaii to the said Circuit Court, the said Supreme Court quashed said Writ of Error.

Wherefore and on account of said manifest errors and each of them, each of which errors appears upon the record of said cause and in the decision and judgment of said Supreme Court of the Territory of Hawaii said William Notley, Charles Notley and Maria Hughes pray that the judgment of the said Supreme Court of the Territory of Hawaii in said cause be reversed and that the said Supreme Court of the Territory of Hawaii be ordered to enter an order sustaining the exceptions of the present plaintiffs in error and remanding the said cause to the Circuit Court of the Fourth Circuit for further proceedings.

Honolulu, April 24, 1906.

(S.) SIDNEY M. BALLOU,
(S.) J. J. DUNNE,
Attorneys for Plaintiffs in Error.

729 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the United States, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY and MARIA HUGHES, Plaintiffs in Error,
vs.
CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Affidavit as to Amount Involved.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

Charles Notley of Honolulu, Oahu, Territory of Hawaii, being first duly sworn, deposes and says that he is one of the plaintiffs in error in the above entitled cause and is well acquainted with the matters in controversy in said cause and with the interests of plaintiffs in error therein, that the value of the estate sought to be disposed of by and under the alleged will of Charles Notley, deceased, the validity of which is in dispute in said cause, is upwards of Three Hundred Thousand Dollars ($300,000), that the value of the interests in said estate involved in said cause and dependent upon the outcome of the said controversy between the plaintiffs in error and the defendants in error, exclusive of costs, far exceeds the sum or value of Five Thousand Dollars ($5000.), that he is totally disinherited under said alleged will and that the value of his individual

share in said estate, if said alleged will is set aside, will amount to Fifty Thousand Dollars ($50,000).

(S.) CHAS. K. NOTLEY.

Subscribed and sworn to before me this 23rd day of April, 1906.

(S.) BENJ. L. MARX,
Notary Public, First Judicial Circuit,
Territory of Hawaii.

730 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the United States, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Order Allowing Writ of Error from the Supreme Court of the United States to the Territory of Hawaii.

The above entitled cause coming before me upon the petition of the plaintiffs in error therein for a Writ of Error from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii, said cause being entitled in said Supreme Court of the Territory of Hawaii, "In the Matter of the Will of Charles Notley, deceased," and upon examination of said petition and the record in the said matter, and desiring ... give the plaintiffs in error an opportunity to present in the Supreme Court of the United States the questions presented by the record in the said matter,

It is ordered that a Writ of Error be and the same is hereby allowed from the Supreme Court of the United States to the Supreme Court of the Territory of Hawaii in the above entitled cause and that the bond presented by said plaintiffs in error be and the same is hereby approved.

(S.) JOSEPH McKENNA,
Justice of the Supreme Court
of the United States.

Endorsed: Supreme Court of the United States William Notley *et al.*, Pl'fs in error, *vs.* Cecil Brown, *et al.*, def's in error. Petition for Writ of Error, Assignment of Errors, Affidavit as to Amount Involved and Order allowing Writ. Filed in the Supreme Court of the Territory of Hawaii June 14th, 1906, at 4 P. M. (S.) L. P. Scott, clerk Ballou & Marx, 303 Stangenwald Building, Honolulu Attorneys for Plaintiffs in Error. (Office No. —.)

731 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the United States, October Term, 1905.

WILLIAM NOTLEY, CHARLES NOTLEY and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Bond on Writ of Error.

Know all men by these presents that we, Charles Notley, as principal, and Mele K. Notley and Pacific Surety Company, as sureties, are held and firmly bound unto Cecil Brown, Anthony Lidgate, John Notley, a minor, Victoria M. K. Notley, a minor, Lily Notley, a minor, William Notley, a minor, and Emma Danford, or their personal representatives, in the sum of One Thousand Dollars ($1000.) to be paid to the said obligees, their successors, representatives and assigns to the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Whereas the above-named plaintiffs in error have prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the Supreme Court of the Territory of Hawaii, said cause being entitled in the said Court "In the Matter of the Will of Charles Notley, deceased."

Now therefore the condition of this obligation is such that if the above named plaintiffs in error shall prosecute their said writ of error to effect and answer all costs and damages, if they shall fail
732 to make good their plea, then this obligation shall be void, otherwise to remain in full force and effect.

Sealed with our seals and dated this 23rd day of April, A. D. 1906.

(S.) CHAS. K. NOTLEY.
(S.) MELE KALUAKINE NOTLEY.
(S.) PACIFIC SURETY COMPANY,
By H. B. MARINER,
[SEAL.] *Attorney in Fact.*

Signed, sealed and delivered in the presence of
(S.) ALICE M. BROOKS.
(S.) ROBBINS B. ANDERSON.

[Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

On this 23rd day of April, A. D. 1906 personally appeared before me Charles Notley and Mele K. Notley, known to me to be the persons described in and who executed the foregoing bond, who severally acknowledged to me that they executed the same freely and voluntarily and for the uses and purposes therein set forth.

On this 23rd day of April, A. D. 1906, personally appeared before me Harry B. Mariner known to me to be the person whose name is subscribed to the foregoing bond, as the attorney-in-fact of the Pacific Surety Company, and acknowledges to me that he subscribed the name of the Pacific Surety Company thereto as principal and his own name as attorney-in-fact for it, and that he executed the same as the free act and deed of the said Pacific Surety Company for the uses and purposes therein set forth.

(S.) BENJ. L. MARX,
[SEAL.] *Notary Public, First Judicial Circuit, Territory of Hawaii.*

Approved:
(S.) JOSEPH McKENNA, *Justice.*

Endorsed: Supreme Court of the United States William Notley, *et al*, plaintiffs in error *vs.* Cecil Brown, *et al.*, defendants in error. Bond on Writ of Error Filed in the Supreme Court of the Territory of Hawaii June 14th, 1906 at 4.00 P. M. (S.) L. P. Scott, Clerk. Ballou & Marx, 303 Stangenwald Building, Honolulu, Attorneys for plaintiffs in error. (Office No. —.)

733 [Stamped:] Supreme Court, Territory of Hawaii, Jul- 6, 1906.

In the Supreme Court of the Territory of Hawaii.

WILLIAM NOTLEY, CHARLES NOTLEY and MARIA HUGHES, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Certificate of Clerk to Transcript of Record.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

I, Henry Smith, Clerk of the Supreme Court of the Territory of Hawaii, in obedience to the commands of the within Writ, do hereby transmit to the Supreme Court of the United States the above and foregoing transcript of record and do certify the same to be a full,

true and correct transcript of the record and proceedings had in the said Supreme Court of the Territory of Hawaii in the case entitled in said Court "In the Matter of the Will of Charles Notley, deceased" as required by the præcipe of the attorneys for plaintiffs in error attached hereto.

I do further certify that the original Citation with acknowledgment of service thereon and the original Writ of Error and true and correct copies of the Petition for Writ of Error, Assignment of Errors, Affidavit of Amount Involved, Order Allowing Writ of Error and Bond, as the same are on file and of record in my office, are hereto attached and herewith returned.

I do further certify that the said original Writ of Error and copies of the same for W. S. Wise, guardian *ad litem,* defendant in error, and for Holmes & Stanley, attorneys of record for Cecil
734 Brown, Anthony Lidgate and Emma Danford, defendants in error, and also the original of the said Bond, were lodged in my office on the 14th day of June, 1906.

In testimony whereof I have hereunto set my hand and caused the seal of said Supreme Court of the Territory of Hawaii, to be hereunto affixed at Honolulu in said Territory, this sixth day of July, A. D. 1906.

[Seal Supreme Court, Territory of Hawaii.]

HENRY SMITH,
Clerk of the Supreme Court
of the Territory of Hawaii.

Endorsed on cover: File No. 20,311. Hawaii Territory supreme court. Term No. 346. William Notley, Charles Notley and Maria Hughes, plaintiffs in error, *vs.* Cecil Brown and Anthony Lidgate, proponents of the will of Charles Notley, deceased, *et al.* Filed July 20th, 1906. File No. 20,311.

In the Supreme Court of the Territory of Hawaii.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES, and DAVID F. NOTLEY, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Clerk's Certificate.

TERRITORY OF HAWAII, *Honolulu, Oahu, ss:*

I, J. A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify, that the documents attached hereto together with the indorsements thereon and enumerated hereunder, to wit:

1. Petition for Writ of Error,
2. Assignment of Errors and Notice of issuance of Writ of Error,
3. Writ of Error,
4. Motion to Quash Writ of Error,

and 5. Judgment.

are full true and correct copies of the originals thereof which are now on file in the Clerk's Office of said Supreme Court in the above entitled cause. (Supreme Court Division Number 5.)

Witness my hand and the Seal of said Supreme Court at Honolulu, Oahu, this 28th day of September, A. D. 1907.

[Seal Supreme Court, Territory of Hawaii.]

J. A. THOMPSON,
Clerk Supreme Court, Territory of Hawaii.

Supreme Court of the Territory of Hawaii.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES, and DAVID F. NOTLEY, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

(Stamped $2.00.)

Petition for Writ of Error.

To the Supreme Court of the Territory of Hawaii:

The undersigned, William Notley, Charles Notley, Maria Hughes and David F. Notley, respectfully represent:

1. That heretofore, to wit, on the nineteenth day of September, 1902, Honorable Gilbert F. Little, sitting at Chambers in Probate in a cause entitled "In the Matter of the Estate of Charles Notley, deceased," made an order and decree admitting to probate as the last will and testament of Charles Notley, deceased, and as two codicils thereto three certain instruments on file in said cause dated respectively May 18th, 1899, August 2nd, 1900, and April 11th, 1902, and purporting to be the last will and testament of said Charles Notley and two codicils thereto.

2. That the value of the estate of said Charles Notley, deceased, was and is upwards of Three Hundred Thousand Dollars and that your petitioners are the only living children of said Charles Notley, deceased.

3. That your petitioners claiming an interest in such estate by virtue of the statutes of descent of property in this Territory and deeming themselves aggrieved by the decision of said Probate Judge at Chambers duly appealed as contestants from said order and decree to the Circuit Court of the Fourth Circuit and duly moved said appellate court that the following issues of fact might be tried by a jury:

"First. Are the documents, dated respectively May 18, A. D. 1899, August 2, A. D. 1900, and April 11, A. D. 1902, propounded before the Honorable Gilbert F. Little aforesaid sitting in probate at Chambers as the last Will and Testament of Charles Notley, Deceased, and codicils thereto (and admitted to probate as such by said Judge by Order dated the 19th day of September, A. D. 1902), the last Will and Testament of the said Charles Notley, deceased, and codicils thereto?"

"Second. Were such alleged will and codicils thereto executed and published by the said decedent, Charles Notley as and for his last will and testament and codicils thereto by, under and — virtue of undue influence exercised by one Emma Danford residing in the Territory of Hawaii (and beneficiary and devisee mentioned in said alleged will and codicils thereto) over the said Charles Notley, Deceased, at the time of the executing and publishing by the said Charles Notley, Deceased, of said alleged will and codicils thereto?"

4. That a jury was duly empaneled to try said issues of fact and upon the 22nd day of January, 1903, your petitioners as such contestants duly proceeded to trial, the proponents of said last will and testament, to wit, Cecil Brown and Anthony Lidgate then and there being represented by Cecil Brown and G. A. Davis; the minor children of your petitioner, Charles Notley, to wit, John Notley, Victoria M. K. Notley, Lily Notley and William Notley being then and there represented by W. S. Wise their duly appointed guardian *ad litem*, and Emma Danford, one of the beneficiaries under said alleged will and codicils, being then and there represented by W. L. Stanley.

5. That thereupon the proponents of said alleged will read as evidence to the jury the testimony of witnesses for proponents taken before the Probate Judge, to wit, the evidence of Daniel Porter, Dr. George Herbert, Cecil Brown, J. W. Leonhart, Frank F. Fernandez

and Anthony Lidgate; then called as a witness Cecil Brown and thereupon rested their case; that thereupon contestants offered the evidence of the following witnesses, to wit, Samuel Parker, Frank Andrade, S. F. Chillingworth, Mrs. Maria Hughes, Mrs. Emma Notley, Cecil Brown, W. L. Stanley, John Tavares, Miss Maria A. Hughes, Charles Notley, David Notley, Miss V. M. K. Notley, Miss Lily Notley and John Notley; and thereupon contestants closed their case.

6. That thereupon proponents presented and made the following motion:

"In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

In the Appeal of Charles Notley *et al.* from the Order of Probate.

In the Matter of the Last Will and Testament of CHARLES NOTLEY, SENIOR, Deceased.

Contestants having closed, now come Cecil Brown, and Anthony Lidgate, proponents of the last Will and Testament of the late Charles Notley, Sr., Deceased, and move the Court here that the jury empaneled to try this cause on the appeal of Charles Notley, Jr., David Notley, Maria Hughes and William Notley, from the order of Probate made by the Circuit Court of the Fourth Circuit, on the 19th day of September, 1902, and upon the issue of fact filed in this Court on the 21st day of January, 1903, be directed and instructed to find a verdict for the proponents of said will. This motion is based upon the records in this cause and upon the grounds stated and filed with the stenographer upon the filing of this motion.

(Signed) ANTHONY LIDGATE,
CECIL BROWN,
By Their Attorneys, GEORGE A. DAVIS,
W. L. STANLEY,
CECIL BROWN.

Dated at Hilo, January 27th, 1903."

The Court after having heard argument upon proponents' motion that the jury be directed and instructed to find a verdict for proponents, granted and allowed the same, whereupon counsel for contestants excepted to the ruling of said Court and to the granting of said motion, which exception was duly allowed.

7. That thereupon counsel for proponents moved orally that the Court instruct the jury and ask them to bring in a verdict according to the form submitted, which said form submitted as aforesaid, is as follows:

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

Judge W. J. Robinson, Presiding.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

We, the jury in the above entitled cause find for the proponents, and to the first question of fact submitted to us answer and say that the Will and codicils dated respectively May 18, 1899, August 2, 1900, and April 11, 1902, are the last Will and Codicils of Charles Notley, Deceased, and in answer to the second question of fact submitted answer, say and find that said will and codicils were not executed by, under or by virtue of undue influence exercised by Emma Danford at the time of the executing and publishing by said Charles Notley, Deceased, of said Will and codicils thereto.

(Signed) —— ——, *Foreman.*

Hilo, Hawaii, Territory of Hawaii, January 28th, A. D. 1903.

Whereupon the Court granted said motion that the jury be instructed to bring in a verdict according to the form aforesaid; whereupon counsel for contestants excepted to the granting of said motion on the ground that the granting of the same is contrary to law and the evidence and not justified by the evidence adduced in behalf of the contestants to the will, which exception was duly allowed.

8. That thereupon the Court instructed the jury to find a verdict for the proponents in the form aforesaid, to which instruction counsel for contestants excepted, which exception was allowed.

9. Thereupon the jury in pursuance of said instruction, chose a foreman without retiring and thereupon said jury returned a verdict for the proponents in the form requested by proponents as aforesaid and submitted to them by the Court as aforesaid. Whereupon counsel for contestants excepted to the verdict as so rendered as aforesaid, as contrary to the law and evidence and to the weight of evidence and gave notice of intention to move for a new trial on the ground that said verdict was contrary to the law and the evidence and the weight of evidence, which said exception was duly allowed by the Court.

The Court thereupon discharged the jury from further service in the case.

10. That thereupon counsel for contestants filed a motion for a new trial and before filing the same paid all costs of Court and deposited $100. in lieu of bond for costs to accrue, which said motion for a new trial, is as follows:

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, January Term, A. D. 1903.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

Motion for a New Trial.

Maria K. Notley, Charles Notley, Maria Hughes, William Notley and David Notley, contestants herein, hereby move for a new trial herein and that the verdict rendered herein be set aside on the following grounds, to wit:

First. That said verdict is contrary to the law and the evidence and the weight of evidence.

Second. For errors of law committed by the Trial Judge in refusing to admit evidence that should have been admitted in behalf of the contestants and as erroneously admitting evidence that should have been excluded and for errors in instructing the jury and duly excepted to.

This motion is based upon all records and papers herein and the stenographer's notes of evidence and proceedings herein.

KINNEY, McCLANAHAN & BIGELOW,
Attorneys for Contestants.

Dated January 28th, A. D. 1903.

Whereupon said motion was duly heard and over-ruled, whereupon counsel for contestants excepted to the refusal of the presiding Judge to grant said motion for a new trial, which exception was duly allowed.

11. Thereafter it appearing that an order had been made by Judge Robinson and filed January 29, 1903, confirming the decree of Judge Little admitting the alleged will of Charles Notley to Probate, which order was *ex parte* and obtained without notice to or knowledge of contestants, said contestants on said 8th day of June, 1905, filed "Contestants' Motion to set aside Order of Judge Robinson, filed January 29, 1903, confirming Decree of Judge Little, admitting Will to Probate" together with the affidavit of W. A. Kinney, and upon oral motion the evidence of W. A. Kinney was taken in support of said "Contestants' Motion to set aside order," etc.

That thereafter, to wit, on the 28th day of August, 1905, the Court denied the said "Contestants' Motion to set aside Order of Judge Robinson, filed January 29, 1903, confirming Decree of Judge Little admitting Will to Probate," to which denial of said motion counsel for contestants duly noted an exception and filed a written exception, which was allowed and signed by the Judge.

12. That after the filing of said "Contestants' Motion to set aside Order," etc., but before any action on the same, to wit, on said 8th day of June, 1905, counsel for proponents moved that the Clerk of the Court be ordered to sign the form of judgment by proponents in conformity with the order of Judge Robinson, dated January 28, 1903, which motion was granted by the Court and the Clerk ordered

to sign the judgment accordingly; without prejudice to said "Contestants' Motion to set aside order, etc.," then pending, to the granting of which motion and order counsel for contestants duly noted an exception which was allowed.

13. That thereafter, to wit, on said 8th day of June, 1905, said judgment was signed and entered by the Clerk and filed in said cause, whereupon counsel for contestants, filed the following written exceptions:

In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, May Term, A. D. 1905.

In the Matter of the Will of CHARLES NOTLEY, Deceased.

Will Contest.

Contestants' Exceptions.

Contestants except to the allowance of proponents' motion that the Clerk of Court be ordered to sign the form of judgment filed January 29th, 1903, and to the judgment so signed on the ground that such allowance is illegal, null and void and not justified by the law or evidence or record herein and to the judgment on the ground that said judgment is contrary to the law and evidence and weight of evidence and without authority of law and is illegal, null and void.

Dated Hilo, June 8th, 1905.

(S'g'd) KINNEY, McCLANAHAN & COOPER,
Att'ys Contestants.

which exceptions were duly allowed and signed by the Presiding Judge on the said 8th day of June, 1905.

14. That your petitioners deem themselves aggrieved by said decisions of said Circuit Court of the Fourth Circuit and of the presiding Judge thereof as more fully appears by their assignment of errors herewith.

15. That six months have not elapsed from the rendition of judgment in said cause and that execution thereon is not fully satisfied.

16. That your petitioners being the plaintiffs in error herein desire that the record shall include a transcript of evidence in the case as well as all pleadings, motions, notes or bills of exception, exhibits, clerks' or magistrates' notes of proceedings.

17. That the sum of Twenty-five Dollars has been deposited by your petitioners to cover costs, and a bond has been filed with the Clerk in favor of the prevailing parties in the proceeding in which the error is alleged to have occurred or their personal representatives conditioned for the payment of the judgment in said original cause in case of failure to sustain the Writ of Error.

Wherefore your petitioners pray that a Writ of Error may be issued from this Honorable Court to the Circuit Court of the Fourth

Circuit in said action entitled "In the Matter of the Estate of Charles Notley, deceased," wherein Cecil Brown and Anthony Lidgate were proponents of the alleged will of said Charles Notley, deceased; and William Notley, Charles Notley, Maria Hughes and David F. Notley were contestants; and John Notley, Victoria M. K. Notley, Lily Notley and William Notley, minors by W. S. Wise, guardian *ad litem*, appeared as parties of record and Emma Danford, one of the beneficiaries under said alleged will appeared as a party of record, commanding the Clerk of said Court forthwith to send up to this Court the record and all exhibits filed in said proceedings, including all pleadings, motions, notes or bills of exceptions, exhibits, clerks' or magistrates' notes of proceedings and a transcript of the evidence in the case; and that upon due hearing of the matters and things herein alleged this Honorable Court shall enter judgment reversing the judgment of the Circuit Court of the Fourth Circuit in said action, or such other judgments as the facts and law warrant.

Honolulu, November 23, 1905.

WILLIAM NOTLEY,
CHARLES NOTLEY,
MARIA HUGHES, AND
DAVID F. NOTLEY,
By Their Attorneys, KINNEY, McCLANAHAN & COOPER,
BALLOU & MARX.

HONOLULU, OAHU, *Territory of Hawaii, ss:*

Charles Notley being duly sworn on oath deposes and says that he is one of the petitioners named in the foregoing petition for Writ of Error; that he has read said petition and knows the contents thereof and that all and singular the matters and things therein alleged are true.

CHAS. K. NOTLEY.

Subscribed and sworn to before me this 24th day of November, 1905.

[SEAL.] GUSSIE H. CLARK,
Notary Public, First Judicial Circuit, Territory of Hawaii.

(Endorsed:) L. 6331. Supreme Court Territory of Hawaii. William Notley, *et al.*, Plaintiffs in Error, *vs.* Cecil Brown and Anthony Lidgate *et al.*, Defendants in Error. Petition for Writ of Error. Received $26.00. Filed Nov. 24, 1905. George Lucas, Clerk. Kinney, McClanahan & Cooper, Ballou & Marx, 303 Stangenwald Bldg. Honolulu Attorneys for Plaintiffs in Error. (Office No. —.)

Supreme Court of the Territory of Hawaii.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES, and DAVID F. NOTLEY, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Assignment of Errors.

Now come William Notley, Charles Notley, Maria Hughes and David F. Notley, petitioners and plaintiffs in error in the above entitled cause, and in connection with their petition for Writ of Error herein make the following assignment of errors which they state occurred in the Trial and other proceedings in the Circuit Court of the Fourth Circuit, Territory of Hawaii, in the Matter of the Estate of Charles Notley, deceased, being petition for probate of will.

First. That the Court erred in granting the following motion:

"In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

In the Appeal of Charles Notley *et al.* from the Order of Probate.

In the Matter of the Last Will and Testament of CHARLES NOTLEY, SENIOR, Deceased.

Contestants having closed, now come Cecil Brown, and Anthony Lidgate, proponents of the last will and testament of the last Charles Notley, Sr., Deceased, and move the Court here that the jury empaneled to try this cause on the appeal of Charles Notley, Jr., David Notley, Maria Hughes and William Notley, from the Order of Probate made by the Circuit Court of the Fourth Circuit, on the 19th day of September, 1902, and upon the issue of fact filed in this Court on the 21st day of January, 1903, be directed and instructed to find a verdict for the proponents of said Will. This motion is based upon the records in this cause and upon the grounds stated and filed with the stenographer upon the filing of this motion.

(Signed) ANTHONY LIDGATE,
CECIL BROWN,
By Their Attorneys, GEORGE A. DAVIS,
W. L. STANLEY,
CECIL BROWN.

Dated at Hilo, January 27th, 1903."

Second. That the Court erred in instructing the jury to find a verdict for proponents.

Third. That the Court erred in instructing the jury to bring in a verdict according to the form submitted by counsel for proponents which form was as follows:

"In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii.

Judge W. J. Robinson, Presiding.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

We, the Jury in the above entitled cause find for the proponents, and to the first question of fact submitted to us answer and say, that the Will and codicils dated respectively May 18, 1899, August 2, 1900, and April 11, 1902, are the last Will and codicils of Charles Notley, Deceased, and in answer to the second question of fact submitted answer, say and find that said Will and codicils were not executed by, under or by virtue of undue influence exercised by Emma Danford at the time of the executing and publishing by said Charles Notley, Deceased, of said Will and codicils thereto.

(Signed) —— ——, *Foreman.*

Hilo, Hawaii, Territory of Hawaii, January 28th, A. D. 1903."

Fourth. That the verdict rendered in said cause was and is erroneous, and was and is contrary to law and the evidence, and to the weight of the evidence.

Fifth. That the Court erred in over-ruling contestants' motion for a new trial which motion was as follows:

"In the Circuit Court of the Fourth Judicial Circuit, Territory of Hawaii, January Term, A. D. 1903.

In the Matter of the Estate of CHARLES NOTLEY, SENIOR, Deceased.

Motion for a New Trial.

Maria K. Notley, Charles Notley, Maria Hughes, William Notley and David Notley, contestants herein, hereby move for a new trial herein and that the verdict rendered herein be set aside on the following grounds, to wit:

First. That said verdict is contrary to the law and the evidence and the weight of evidence.

Second. For errors of law committed by the Trial Judge in refusing to admit evidence that should have been admitted in behalf of the contestants and as erroneously admitting evidence that should have been excluded and for errors in instructing the jury and duly excepted to.

This motion is based upon all records and papers herein and the stenographer's notes of evidence and proceedings herein.

Dated January 28th, A. D. 1903.

KINNEY, McCLANAHAN & BIGELOW,
Attorneys for Contestants."

Sixth. That the Court erred in making the *ex parte* order of January 29, 1903, confirming the decree of Judge Little admitted the alleged will of Charles Notley to probate.

Seventh. That the Court erred in denying "Contestants' motion to set aside order of Judge Robinson filed January 29, 1903, confirming decree of Judge Little admitting will to probate."

Eighth. That the Court erred in ordering the Clerk to sign the form of judgment submitted by proponents.

Nonth. That the Court erred in entering judgment for the proponents in said matter of the estate of Charles Notley, deceased, being petition for probate of will.

Honolulu, November 23, 1905.

KINNEY, McCLANAHAN & COOPER,
BALLOU & MARX,
Attorneys for Plaintiffs in Error.

To Cecil Brown, Anthony Lidgate, John Notley, a Minor; Victoria M. K. Notley, a Minor; Lily Notley, a Minor, and William Notley, a Minor, said Minors Appearing by their Guardian *ad Litem*, W. S. Wise, and to Emma Danford:

Please take notice that a Writ of Error has issued upon the petition of William Notley, Charles Notley, Maria Hughes and David Notley in connection with the foregoing assignment of errors.

KINNEY, McCLANAHAN & COOPER,
BALLOU & MARX,
Attorneys for WILLIAM NOTLEY,
CHARLES NOTLEY,
MARIA HUGHES,
DAVID F. NOTLEY.

Honolulu, November 24, 1905.

(Endorsed:) Supreme Court Territory of Hawaii. William Notley, *et al.*, Plaintiffs in Error, *vs.* Cecil Brown and Anthony Lidgate *et al.*, Defendants in Error. Assignment of Errors and Notice. Filed —— —, 190–. —— ——, Clerk. Kinney, McClanahan & Cooper, Ballou & Marx, 303 Stangenwald Bldg., Honolulu Attorneys for Plaintiffs in Error.

Supreme Court of the Territory of Hawaii.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES, and DAVID F. NOTLEY, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

(Stamped $2.)

Writ of Error.

To A. S. Le Baron Gurney, Clerk of the Circuit Court of the Fourth Circuit, Territory of Hawaii:

Whereas in an action lately pending before the Circuit Court of the Fourth Judicial Circuit entitled "In the Matter of the Estate of Charles Notley, deceased," wherein Cecil Brown and Anthony Lidgate were proponents of the alleged will of said Charles Notley and William Notley, Charles Notley, Maria Hughes and David F. Notley were contestants and John Notley, Victoria M. K. Notley, Lily Notley and William Notley, minors, by W. S. Wise, guardian *ad litem*, appeared as parties of record, and Emma Danford, one of the beneficiaries under said alleged will, appeared as a party of record, error is alleged to have occurred as appears by the assignment of errors on file in this Court, you are commanded forthwith to send up to this Court the record and all exhibits filed in said proceedings including all pleadings, motions, notes, or bills of exception, exhibits, clerks' or magistrates' notes of proceedings and a transcript of the evidence in the case.

Witness the Honorable W. F. Frear, Chief Justice of the Supreme Court, Territory of Hawaii, this 24th day of November, 1905.

[SEAL.] GEORGE LUCAS,
Deputy Clerk, Judiciary Department.

(Endorsed:) Supreme Court Territory of Hawaii. William Notley *et al.*, Plaintiffs in Error, *vs.* Cecil Brown and Anthony Lidgate *et al.*, Defendants in Error. Writ of Error. Filed November 24, 1905. George Lucas, Clerk. Kinney, McClanahan & Cooper, Ballou & Marx, 303 Stangenwald Bldg., Honolulu, Attorneys for Plaintiffs in Error. (Office No. —.)

Supreme Court of the Territory of Hawaii.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES, and DAVID F. NOTLEY, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; LILY NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Motion to Quash.

Now come Cecil Brown and Anthony Lidgate, proponents of the will of Charles Notley, deceased, and Emma Danford, by their attorneys Holmes & Stanley, and move this Honorable Court that the Writ of Error issued in the above entitled cause on the 25th day of November, 1905, be quashed upon the grounds:

(1) That it is apparent upon the record that this Honorable Court has heretofore, to wit, on the 8th day of March, 1904, on the 3rd day of June, 1904, and on the 2nd day of August, 1904, decided the questions now sought to be reviewed and embraced in the Assignment of Errors filed herein; and

(2) That the Petition for Writ of Error was not filed nor the writ issued within six months from the rendition of judgment in said cause, the same having been rendered and filed on, to wit, the 29th day of January, 1903.

This motion is based upon the record herein.

CECIL BROWN AND
ANTHONY LIDGATE,
Proponents of the Will of Charles Notley, Deceased, and
EMMA DANFORD,
By Their Attorneys, HOLMES & STANLEY.

Dated, December 14, 1905.

(Endorsed:) Supreme Court of the Territory of Hawaii. William Notley, Charles Notley, Maria Hughes and David F. Notley, Plaintiffs in Error, *vs.* Cecil Brown and Anthony Lidgate proponents of the Will of Charles Notley, deceased, John Notley, a minor, Lily Notley, a minor, by W. S. Wise, their guardian *ad litem* and Emma Danford, Defendants in Error. Motion to Quash. Filed Dec. 14, 1905. George Lucas, Clerk.

Supreme Court of the Territory of Hawaii, October Term, 1906, September Session, 1907.

WILLIAM NOTLEY, CHARLES NOTLEY, MARIA HUGHES, and DAVID F. NOTLEY, Plaintiffs in Error,

vs.

CECIL BROWN and ANTHONY LIDGATE, Proponents of the Will of Charles Notley, Deceased; JOHN NOTLEY, a Minor; VICTORIA M. K. NOTLEY, a Minor; LILY NOTLEY, a Minor, and WILLIAM NOTLEY, a Minor, by W. S. WISE, Their Guardian *ad Litem*, and EMMA DANFORD, Defendants in Error.

Judgment.

Defendants in Error above named having made a motion to quash the writ of error isued herein on the 25th day of November, A. D. 1905, upon grounds therein set forth, to wit:

(1) That said writ was not issued within six months from the rendition of judgment; and

(2) That all errors assigned have been heretofore decided by this Court in 15 Hawaiian Reports, page 435-700, 16 Hawaiian, 66; and said motion coming on to be heard, now after reading and filing said motion to quash said writ of error and after hearing W. L. Stanley, Esq., of counsel for defendants in error in support of said motion and S. M. Ballou, Esq., of counsel for plaintiffs in error in opposition thereto and due deliberation having been had, it is

Ordered, adjudged and decreed that said motion to quash the writ of error issued herein on the 25th day of November, 1905, be and the same hereby is granted and that said writ be and it hereby is dismissed.

Dated Honolulu, September 27th, A. D. 1907, as of April 13, 1906.

By the Court:

[SEAL.] J. A. THOMPSON, *Clerk.*

We consent to the entry of the above judgment.

HOLMES & STANLEY,

Attorneys for Defendants in Error.

(Endorsed:) Supreme Court Territory of Hawaii. William Notley *et al.*, Plaintiffs in Error, *vs.* Cecil Brown *et al.*, Defendants in Error. Judgment. Filed September 28, 1907, at 12 Noon. J. A. Thompson, Clerk. Kinney & Marx, 303 Stangenwald Bldg., Honolulu, Attorneys for Pl'ffs in Error. (Office No. —.)

In the Supreme Court of the United States, October Term, 1907.

No. ——.

WILLIAM NOTLEY ET AL.
vs.
CECIL D. BROWN ET AL.

Certain proceedings in the Supreme Court of the Territory of Hawaii having been omitted from the transcript of record from the said court filed in this cause, namely, the petition of William Notley, Charles Notley, Maria Hughes and David F. Notley to the Supreme Court of Hawaii for a writ of error to the Circuit Court of the Fourth Circuit of Hawaii, in respect to an order admitting to probate the paper writings purporting to be the last will and testament of Charles Notley, deceased, and two codicils thereto, dated, respectively, May 18, 1899, August 2, 1900, and April 11, 1902, a writ of error issued pursuant to the said petition, a motion to quash the said writ of error on behalf of the proponents of the will, and a judgment of the Supreme Court of the Territory of Hawaii, rendered September 27, 1907, granting the said motion and quashing the said writ, it is hereby stipulated that the annexed transcript of the said parts of the record in said cause, so omitted from the transcript originally filed herein, be by leave of the court filed herein at the present term of this Court with like effect as if included in the transcript originally filed in the above cause, subject to all just and legal exception by and on behalf of the defendants in error as to the legal competency and effect of the said several omitted papers and proceedings embraced in the said annexed, additional transcript.

J. J. DARLINGTON,
Attorney for Plaintiffs in Error.
W. L. STANLEY,
A. B. BROWNE,
Attorneys for Defendants in Error.

[Endorsed:] Supreme Court Territory of Hawaii. William Notley, Charles Notley, Maria Hughes and David F. Notley, Plaintiffs in Error, *vs.* Cecil Brown and Anthony Lidgate, proponents of the Will of Charles Notley, deceased, John Notley, a minor, Victoria M. K. Notley, a minor, Lily Notley, a minor, and William Notley, a minor, by W. S. Wise, their guardian *ad litem*, and Emma Danford. Stipulation and certified copies of petition for writ of error. Assignment of errors and notice of issuance of writ of error. Writ of error and motion to quash writ of error.

[Endorsed:] File No. 20,311. Supreme Court U. S. October Term, 1907. Term No. 68. William Notley *et al.*, Pl'ffs in Error, *vs.* Cecil Brown *et al.* Stipulation of counsel and addition to record. Filed Oct. 14th, 1907.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 346.

WILLIAM NOTLEY ET AL., PLAINTIFFS IN ERROR,

vs.

CECIL D. BROWN ET AL., DEFENDANTS IN ERROR.

Plaintiffs

Brief for ~~Defendants~~ in Error, on Motion to Dismiss.

Statement.

Charles Notley, Sr., died May 2, 1902, leaving real and personal estate of the estimated value of $400,000.00, and a paper writing purporting to be his will, the validity of which was contested on the ground of undue influence.

On January 28, 1903, the court, upon motion of proponents, instructed the jury to find a verdict sustaining the will, and thereupon, after the jury had so found (Rec., p. 80), the presiding judge directed the clerk to sign and enter up judgment on the verdict (Rec., pp. 69, 420–1). On the following day judgment was filed, but not signed until June 8, 1905, when, on motion of the proponents, the court passed an order directing the clerk to sign it "as of the 28th day of January, 1903," which was done (Rec., pp. 71, 421).

On March 8, 1904, the Supreme Court of the Territory

affirmed the action below, On June 3, 1904, a motion for rehearing was denied, Galbraith, J., dissenting (Rec., pp. 398, 411, 412), and, on August 2, 1904, a second motion for rehearing was denied (Rec., p. 416.)

After the *nunc pro tunc* signature of the judgment, the contestants again sued out a writ of error to the Supreme Court of the Territory, which was quashed on April 13, 1906, Hartwell, J., dissenting (Rec., pp. 420, 423,). On June 22, 1906, Chief Justice Frear certified that he had denied an application for writ of error from this court (Rec., p. 419), and on May 28, 1906, the writ was granted by Mr. Justice McKenna.

The provision of the Organic Act in force until March 3, 1906, in relation to appeals, was as follows:

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters and proceedings as between the courts of United States and the courts of the Territory of Hawaii" (31 Stats., 158).

The Organic Act was amended in this respect March 3, 1905, by adding at the end of the section the following:

> "Provided, that writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of $5,000."

The present motion requires consideration of the question: Does the Act of March 3, 1905, admit of review by this court, of a judgment rendered prior to that date?

The theory of the learned brief for the defendants in error is that the judgment of March 8, 1904, being not subject to appeal at the time it was rendered, constitutes

a vested right, which it is not within the province or power of Congress to disturb by subsequent legislation permitting appeal; or that, if this is not so, at least the presumption of law is against any intended retroactive effect of the act.

The two decisions of this court relied upon in support of the objection, White *vs.* United States, 191 U. S., 545, 533, and United States *vs.* American Sugar Company, 202 U. S., 563, 576, are evidently cited in inadvertent oversight of a material distinction between those cases and the case at bar. Here, the statute involved belongs to the class of statutes known as remedial, which require a liberal construction, and one which will give effect to the beneficient intent of the Congressional will. U. S. *vs.* Padleford, 9 Wall., 531, 555; Telegraph Company *vs.* Eyser, 19 Wall., 419, 429; Bechtel *vs.* United States, 101 U. S., 55, 80; Beley *vs.* Naphtaly, 169 U. S., 353, 361; McBurney *vs.* Carson, 99 U. S., 567.

> "An act intended to extend the right of appeal is remedial and should receive a liberal construction."
>
> 2 Lewis' Sutherland on Statutory Construction, sec. 717.
>
> Stewart *vs.* Kahn, 11 Wall., 493, 504.
>
> United States *vs.* Wiley, 11 Wall., 508.

With respect to the claim that a statute giving retroactively a right of appeal where none existed at the date of the rendition of the judgment is unconstitutional, the authorities cited in support, in addition to being out of harmony with the weight of authority upon that subject, labor under the disadvantage of being directly opposed to the decisions of this court. Sampeyreac *vs.* United States, 7 Pet., 232; Freeborn *vs.* Smith, 2 Wall.; 160; Garrison *vs.* City of New York, 21 Wall., 196; Freeland *vs.* Williams, 131 U. S., 405, 416,

420; Stephens *vs.* Cherokee Nation, 174 U. S., 445, 447-8.

In view of these repeated decisions of this court, extending practically throughout the entire period of its existence, it is deemed unnecessary to enter upon the authorities elsewhere.

It is further submitted that the Act of March 3, 1905, unquestionably a remedial statute, entitled to a liberal and beneficent construction, justly admits of the right of appeal claimed by the plaintiffs in error in the present case. It provides that writs of error or appeals "may also be taken from the Supreme Court of Hawaii to the Supreme Court of the United States in all cases where the amount involved, excluding costs, exceeds the sum or value of $5,000." Its object, evidently, was to place Hawaii, with respect to appeals from judgments by its courts, upon the precise footing of the territories, in any of which writs of error and appeals sued out within two years after the judgment complained of were allowed. In the light of the above cited authorities, establishing that there is nothing unconstitutional nor any interference with vested rights in granting the right of review or appeal in the case of judgments already rendered, why should it be held that the beneficent purpose of the act, namely, to give the same right of review or appeal in the case of judgments of the courts of Hawaii as existed in the case of judgments in other territorial courts, should not be given full effect? Since, in any other territory, a judgment rendered on March 8, 1904, was subject to a writ of error to this court at any time within two years thereafter, why should this act, intended to place Hawaii on the same footing as the other territories, be held not to have done so as to a judgment of that date?

The writ in this case, it is true, was sued out May 28, 1906, which is several months beyond the two-year period after March 8th, the date of the judgment; but

the motions for a rehearing were not disposed of until August 2, 1906.

> "The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal." Brockett *vs.* Brockett, 2 How., 238, 249; Memphis *vs.* Brown, 94 U. S., 715; Railway *vs.* Murphy, 111 U. S., 488; Aspen Company *vs.* Billings, 150 U. S., 31, 36; Voorhees *vs.* Manufacturing Company, 151 U. S., 135; Railroad Company *vs.* Holmes, 155 U. S., 137; Kingman *vs.* Manufacturing Company, 170 U. S., 675.

Returning to the question presented by the motion to dismiss, Railroad Company *vs.* Grant, 98 U. S., 298, is interesting as the converse of the present case. In it a judgment had been rendered for an amount exceeding $1,000, the amount then necessary to admit of a writ of error, which had been duly sued out, and the case was pending in this court awaiting hearing when Congress amended the statute by increasing the jurisdictional amount to $2,500, there being nothing in the phraseology of the act to indicate a retroactive intent. *Held*, that, although the amendment did not vacate or amend the writ of error that had been allowed, it took away the right to hear and determine the case, and it was accordingly dismissed. And to the like effect see Ex parte McCardle, 7 Wall., 506; The Assessor *vs.* Osbornes, 9 Wall., 567, 575; The Radsall, 6 Cranch, 329; S. Carolina *vs.* Gaillard, 101 U. S., 433, 438; Fealay et al. *vs.* U. S., 5 Cranch, 281; Remson *vs.* Alexander, 103 U. S., 522; Surnell *vs.* Patrick Co., 137 U. S., 141.

In Larkins *vs.* Safferan, 15 Fed. Rep., 147, the court

had no jurisdiction when the suit was filed, but, while the case was pending on its docket, an act was passed conferring jurisdiction in such cases. *Held*, that the case, though instituted when there was no jurisdiction, came within the effect and operation of the act. See, also, Cooley's Constitutional Limitations, 5th ed., 115n.; 26 Am. & Eng. Encl. L., 696; Lovell *vs.* Davis, 52 Mo. App., 342; McNamara *vs.* Railroad Company, 12 Minn., 388; Grimes *vs.* Bayne, 2 Minn., 72.

The motion to dismiss, it is respectfully submitted, should be denied.

SIDNEY M. BALLOU,
J. J. DUNNE,
Attorneys for ~~Defendants~~ in Error.

Supreme Court, U. S.
FILED.
NOV 28 1906
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted]68.

WILLIAM NOTLEY, CHARLES NOTLEY, AND MARIA HUGHES, PLAINTIFFS IN ERROR,

vs.

CECIL BROWN AND ANTHONY LIDGATE, PROPONENTS OF THE WILL OF CHARLES NOTLEY, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF.

ALDIS B. BROWNE,
ALEX. BRITTON,
Attorneys for Defendants in Error.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23714

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 346.

WILLIAM NOTLEY, CHARLES NOTLEY, AND MARIA HUGHES, PLAINTIFFS IN ERROR,

vs.

CECIL BROWN AND ANTHONY LIDGATE, PROPONENTS OF THE WILL OF CHARLES NOTLEY, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

MOTION TO DISMISS.

Now come the defendants in error in the above-entitled cause, by their counsel, and respectfully move this honorable court that the writ of error herein be dismissed for want of jurisdiction.

Respectfully submitted,

ALDIS B. BROWNE,
ALEX. BRITTON,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1906.

No. 346.

WILLIAM NOTLEY, CHARLES NOTLEY, and MARIA HUGHES, *Plaintiffs in Error,*

vs.

CECIL BROWN and ANTHONY LIDGATE, *Proponents of the Will of Charles Notley, Deceased, et al.*

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

Statement.

Charles Notley, Sr., of Honolulu, died in May, 1902, testate. Petition for probate of his will and annexed codicils was presented by Cecil Brown, as his executor (R., 1-6), and was met by contest of his widow, Mele K. Notley, and children, Charles Notley, Jr., David F. Notley, Maria Hughes, and William Notley, alleging such will and codicils to be void because of "undue influence exercised by one Emma Danford, residing in the Territory of Hawaii, a beneficiary and legatee" therein, over the testator at the time of the execution of the will and codicils (R., 6-7). After hearing, the probate court admitted the will and codicils to probate (R., 8-10). Appeal from such order was taken to the circuit court of the fourth circuit, where issues were framed

and testimony was presented on behalf of contestants in support of the ground of protest, viz., "undue influence." At the conclusion thereof the trial court granted a motion to instruct the jury to return a verdict in favor of the proponents of the will and entered corresponding judgment (R., 362-363; R., 70-71). On appeal that judgment was affirmed by the supreme court of the Territory on March 8, 1904 (Opinion, R., 379-398). Motion for rehearing was denied June 3, 1904 (R., 411-414), and a second motion for rehearing was denied August 2, 1904 (R., 416).

It is important here to note:

1. The issue in the cause thus brought under judicial review, and the case presented to and decided by the supreme court of the Territory, is concisely and correctly stated in that court's original opinion (R., 380) thus:

> "The circuit judge, after a hearing, admitted to probate the will and codicils of the decedent, Charles Notley. The contestants, his widow and four children, Charles, William, Maria and David, appealed to the circuit court, and the case was there tried before a jury and a different circuit judge on the issue of undue influence by the decedent's niece, Mrs. Emma Danford, *née* Mullinger. At the close of the contestants' case, the proponents moved the court to direct a verdict in their favor. This motion was granted and a verdict was rendered as directed. The question now raised by the contestants' exceptions is whether there was sufficient evidence of undue influence to go to the jury."

2. That the cause was originally decided in that court on March 8, 1904, and the first motion for rehearing denied June 3, 1904, and the second and final motion denied on August 12, 1904. On the last-named date, therefore, the cause was certainly *finally* decided in that court, although the petition for writ of error to this court (R., 30) admits:

> "That on the 8th day of March, 1904, the supreme court of the Territory entered a *final* judgment in the above entitled cause. * * * ."

And the assignment of errors (R., 431-432) are to like effect.

Whichever date be taken—March 8 or August 12, 1904—it is manifest that when the judgment of the supreme court of the Territory became final no jurisdiction to review the cause in this court then existed. The question involved was wholly local—"will or no will"—and was not of the class then made reviewable here.

By section 86 of the act of Congress of April 30, 1900, C. 339, entitled "An act to provide a government for the Territory of Hawaii," it was provided (*inter alia*) that—

> "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii" (31 Stats., 158).

In considering this clause this court, in *Ex parte Wilder's Steamboat Company*, 183 U. S., 545, 551, said:

> "And the remaining clause as to appeals, writs of error, removals of causes and other matters and proceedings between the courts of the United States and the courts of the Territory of Hawaii provides that they shall be governed, not by the laws applicable to other Territories, but by the laws of the United States as to such matters and proceedings 'as between the courts of the United States and the courts of the several States.' Congress may have considered that, owing to the great distance of the Territory of Hawaii from the continent, the appellate jurisdiction over that Territory should be more restricted than over other Territories, and should extend only, as in the case of the several States, to judgments

> against a right claimed under the Constitution, laws or treaties of the United States. But whatever may have been the reasons which influenced Congress, its language is too plain to be misunderstood."

And in *Equitable Life Assurance Society vs. Brown*, 187 U. S., 308, 309, after quoting the foregoing provision of the act of April 30, 1900, the court again said:

> "It follows that the jurisdiction of this court to review judgments of the courts of the Territory of Hawaii is more restricted than is the jurisdiction to review the judgments of the courts of other organized Territories, and is to be measured by the power conferred upon this court to review judgments of State courts (Rev. Stat., par. 709). In *Ex parte Wilder's Steamboat Company*, 183 U. S., 545, the distinction made by the law in question between Hawaii and other Territories was pointed out."

The pending writ of error was allowed on May 28, 1896 (R., 428-429). Jurisdiction to review the cause must therefore rest wholly upon the authority of the act of Congress approved March 3, 1905 (33 Stats., ch. 1465, p. 1035), entitled "An act to amend sections fifty-six, eighty, and eighty-six of 'An act to provide a government for the Territory of Hawaii, approved April thirtieth, nineteen hundred.'"

That act is as follows:

> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section fifty-six of the act of Congress of the United States of America entitled 'An act to provide a government for the territory of Hawaii,' approved April thirtieth, nineteen hundred, be, and the same is hereby, amended by the addition of the following: 'and all officials thereof shall be appointed or elected, as the case may be, in such manner as shall be provided by the Governor and Legislature of the Territory.'

"SEC. 2. That section eighty of the aforesaid act is hereby amended by the addition of the following: '*Provided, however,* That nothing in this section shall be construed to conflict with the authority and powers conferred by section fifty-six of this act as herein amended.'

"SEC. 3. That section eighty-six of the aforesaid act be amended by adding the following at the end of said section: '*Provided,* That writs of error and appeals may also be taken from the supreme court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of five thousand dollars.'

"SEC. 4. That this act shall take effect and be enforced from and after its passage."

ARGUMENT.

I.

This act needs no interpretation with respect to the point here involved. By its express language it takes effect and operates only *"from and after its passage."*

The final judgment whereof review is here sought was rendered long before its passage. Admittedly no provision for review thereof in this court then existed. By that judgment the rights of the parties had become fixed and vested. The cause had been initiated, heard, and finally determined. No time limit for appeal or review in any higher court was provided. The cause was at an end.

Hence it is manifest that the later act of March 3, 1905, *supra,* cannot be applied to such a case. In express terms that act took effect only from its date. No retroactive effect can be given thereto.

Nor can the act be given retroactive effect in authorizing review of a judgment theretofore made final in the supreme court of Hawaii without violating the settled rule of con-

struction in respect of retroactive legislation. The principle in this regard could not be more clearly stated than is expressed in *White vs. United States,* 191 U. S., 545, 552, thus:

> "But, after all, the main purpose of interpretation is to ascertain and carry into effect the object and purpose of the legislature in making the given law as expressed in the language used. Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the law-making power is acting for the future only and not for the past; *that it is enacting a rule of conduct which shall control the future rights and dealings of men, rather than review and affix new obligations to that which has been done in the past.* While it is undoubtedly within the power of Congress to provide for bounties or gratuities to those in the naval or military service of the United States, we should hardly look for such legislation in an act having the declared purpose and scope of the one now under consideration. Retrospective legislation is not favored (Cooley on Constitutional Limitations, 529). Retrospective laws which have been sustained in the courts have ordinarily had the effect to remedy irregularities in legal procedure, assessment of property for taxation, and the like (Cooley on Const. Lim., 530, 531)."

In *United States vs. American Sugar Refining Company,* 202 U. S., 563, 576, it was said:

> "It was certainly competent for Congress (with the consent of Cuba) to have given the treaty retrospective, immediate or prospective operation. Which did Congress do? And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation 'unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislator cannot be otherwise satisfied' (*United States vs. Burr,* 159 U. S., 178)."

And, speaking directly to the point here involved, Mr. Sutherland, in his work on Statutory Construction (sec. 480, p. 628), in giving numerous examples against the retroactive effect of a statute, pertinently observes:

> "When a right has been perfected by judgment the fruits of recovery cannot be diverted by new legislation, nor subjected to new hazard by reviving a new right to appeal, or some other mode of review."

In *Hooker vs. Hooker,* 10 S. & M. (Miss.), 599, 601, it was held:

> " It is insisted that this cause is embraced by the " act of 1846 notwithstanding the settlement in ques- " tion was made several years before its passage. It " is true the law provides a new remedy, but there is " nothing to show that the legislature intended to " give it a retrospective effect. The operation of a " law must always be prospective, unless the contrary " intention is manifest, even in cases in which it " would be admissible to the law-making power, to " give a retrospective effect.
>
> " By the law in force at the time this settlement " was made, it was final and conclusive, so far as the " action of the probate court was concerned. It " might operate harshly and unjustly on the appel- " lant to take away the conclusive character which " then attached to it. Indeed the power of the legis- " lature to open a judgment and unsettle rights pre- " viously ascertained and determined by a competent " tribunal, would hardly be asserted."

Again, in *Stewart vs. Davidson,* 10 S. & M. (Miss.), 351 358, speaking upon the effect of the final judgment of a probate court, it was held:

> "It was permitted to stand with all the attributes of a final judgment on a matter within the jurisdiction of the court that rendered it. The parties interested in it had acquired rights under it. It was a bar to claims not therein allowed. It derived its force and

character from the laws of the land in existence when it was rendered. Had the legislature power to change its character; to take from it its dignity and impair the rights which it secured? We have decided at the present term that the act of 1846 could not so operate. The legislature cannot open or reverse a judgment rendered according to existing laws. That is judicial power. And if they could authorize this to be done by bill of review, they could prescribe any other mode, and thus strip judgments of their solemnity. We cannot think that the legislature intended to give this act a retrospective operation. It was designed to change the law on that subject in cases thereafter to arise, and so far it can operate and establish a statutory rule. Nothing short of a direct declaration to that effect would justify the supposition that a retrospective operation was intended to be given to the law."

II.

Whilst we confidently submit that, tested by the settled judicial rule, the act of March 3, 1905, *supra*, neither in language nor intent, can be given retroactive effect in order to *create* the right of appeal in respect of a judgment which had long prior thereto become final, it may be pertinently suggested that no such effect could be given the statute without violating fundamental law. It is true, of course, that litigants have no vested right in the remedy which the law may prescribe, and that pending the progress of a cause, before it has thus ripened into final judgment and the litigation thereby terminated, the legislature has the power to enlarge or restrict the remedy and to change the form of procedure, provided, as of course, there is preserved to the litigant the right to some judicial hearing of his cause.

But it will be noted that while this legislative power is conceded it is clearly limited to causes which are then pending, and not to those wherein there has been final judgment and the parties hence dismissed, and with the cause thus put at judicial end.

This principle is well stated in *Jensen et al, vs. Frieke et al.* (113 Ill., 171-175) thus:

> "Within the limitation that the right of the litigant shall not be impaired, and a remedy shall be preserved, the rules of practice and remedies to be pursued are within the legislative discretion and control, the only other limitation being that imposed by section 29 of article 6 of the Constitution that 'all laws relating to courts shall be general and of uniform operation, and the proceedings and practice of all courts shall be uniform.'
>
> "The act operates upon causes pending, irrespective of whether they were commenced before or after it came into force. Parties litigant have no vested right in the rules of practice or modes of proceeding prescribed by law, but at all times, *prior to the final trial of their cause*, the law prescribing the same within the limits before mentioned, may be altered, amended or repealed, and other rules and modes of procedure substituted by the legislature (*Holcomb vs. People*, 79 Ill., 409; *People vs. Hoffman*, 116 *id.*, 587; *Gage vs. Stewart*, 27 *ib.*, 207; *Cooley's Const. Lim.*, sec. 361)."

So in *Willoughby vs. George*, 5 Colo., 80, 82, it was held:

> "The statute in question, in so far as it allows a writ of error to a judgment in respect to which an appeal was barred, prior to its passage is 'retrospective in its operation' and not only within the constitutional prohibition but within the prohibition of fundamental principles governing retrospective laws, independent of constitutional or statutory enactments (Story Con., sec. 1399; Sedgwick Con. & Stat., 173)."
>
> Reaffirmed in *Webster vs. Goff et al.*, 6 Colo., 475, 478.

In *Davis vs. Menasha*, 21 Wis., 491, judgment was entered in the circuit court in 1863. An appeal was taken to the supreme court, but was there dismissed because the bill of

exceptions had not been settled as then required by law by the judge trying the cause. After the appeal had thus been dismissed, the legislature in 1866 passed an act (ch. 115) providing for the settling of the bill of exceptions in cases where the trial judge had died or been removed, "in all cases in any of the courts of record in this State wherein, at any time within three years immediately preceding the passage of the act, judgment shall have been rendered." It was contended by respondents that the act of 1866 was void because it operated to destroy vested rights under the judgment. As to this the supreme court of Wisconsin, per Cole, J., said (p. 494):

> "It seems to us that this view of the law of 1866, so far as this case is concerned, is sound and must prevail. It will be seen that when the law of 1866 took effect (which was on the 25th of April of that year), more than two years had elapsed since the rendition of the judgment. The time for taking an appeal to this court had therefore expired when application was made for a new trial. The judgment was then no longer liable to be reversed for error, or to be set aside upon motion addressed to the discretion and power of the court in which it was rendered. The defendants had availed themselves of the legal rights to contest the matter in the courts; they had exhausted all their legal remedies by appeal or otherwise, and the judgment had become a finality. Under the existing laws the controversy was closed, and the rights of parties under that judgment had become vested, and could not be divested and destroyed by an act of the legislature. * * * So that this enactment, so far as this cause is concerned, must be held invalid, both because it attempts to destroy vested rights, and also because it is an exercise of power on the part of the legislature which belongs to the courts."
>
> Affirmed in *Town of Lancaster vs. Barr,* 25 Wis., 560.

And in *Snydor vs. Palmer* (32 Wis., 406, 410), it was held:

> "No new trial can be granted or right of appeal "given by subsequent legislative enactment, when "those rights have once lapsed and the judgment has "become final between the parties. (*Town of Lan-"caster vs. Menasha,* 21 Wis., 491)."

In *Merrill vs. Sherburne,* 1 N. H., 199, a final decree disallowing probate of a will was entered in 1814, which decree was not then subject to review. In 1817 the legislature, on petition of Merrill, passed an act allowing her to re-enter the cause in the superior court and have it retried like common cases of review. The supreme court of New Hampshire held that the legislative act allowing re-examination of the cause was invalid and unconstitutional, the court, per Woodbury, J., saying (p. 214):

> "Previous to the passage of the act, granting a new trial to this plaintiff, the defendants had become authorized by the laws of the land, to possess the estate of which Ward died seized. Every obstacle to the exercise of their rights had been removed or annulled; and whether those rights became vested by Ward's death or by the final judgment in November, 1814, is immaterial; because both these events had happened before the passage of this act. The defendants, being thus situated, the legislature interfered; not to enact a law, but to pass a decree; not to prescribe a rule for future cases, but to regulate a case which had already occurred; not to make a private statute by the consent of all concerned, but at the request of one party to reverse and alter existing judgments; not to promulgate an ordinance for a whole class of rights in the community, but to make the action of a particular individual an exception to all standing laws on the subject in controversy.
>
> "The expense and inconvenience of another trial were also imposed upon the defendants, and all their claims to the property in dispute which had become indefeasible by the laws then in being, were launched

> again upon the sea of litigation to be lost or saved as accident and opinion might afterward happen to injure or befriend them.
>
> "The misfortune of having vested rights thus disturbed is not small, when we consider, that on this principle, no judgment whatever in a court of law is final. * * * The nature and effect of the act was judicial. It was also retrospective. The legislature cannot pass such an act."

Bates vs. Kimball, Admin., 2 Chipman (Vt.), 77, was an action of debt brought against the administrator of a decedent founded upon a judgment of the commissioners of the court of probate rendered against the administrator. No appeal was taken by the administrator from the commissioners' judgment within the time allowed by law, but subsequently on petition to the legislature a special act was passed allowing the administrator to appeal, which he then did. This appeal was still pending when the case came before the supreme court upon the administrator's plea in bar setting up that the judgment of the commissioners was not final in that it was still pending on appeal. The supreme court of Vermont dismissed the plea, holding that the right of appeal from the commissioners' judgment could not be thus conferred, saying, per Aiken, J. (p. 88):

> "It has already been shown, that the report of the commissioners, on which the present action is founded, has all the qualities of, and must be treated as a final judgment. As such, it perfected a contract between the plaintiff and defendant, and rendered it one of the highest and most solemn nature, because witnessed by the highest kind of evidence, viz., by matter of record (2 Bl. Com., 465; 7 John. Rep., 489). This act, therefore, must be deemed void, as repugnant to art. I, sec. 10, of the Constitution of the United States, which declares, that 'No State shall pass any *ex post facto* law, or law impairing the obligation of contracts.' (See Cranch, 187; 7 same, 161.)

"We have before incidentally suggested, that this judgment vested a right in the present plaintiff.

"He had pursued his claim according to law, and had successfully pursued it to the end of the law. A right, therefore, to have and possess that which he had recovered, had accrued to and vested in him, under the law. Nothing but execution, or what, in such case, is substituted for execution, remained to be done. The act in question is therefore retrospective, virtually vacating the judgment, and divesting the right acquired under it; and is for that reason void. It is a settled principle of the common law, that a statute shall not have a retrospective operation, so as to take away a vested right (6 Bac. Abr., 370; 2 Mod. Rep., 310; 4 Burr., 2460).

" 'Upon principle, (says Story, J.) every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective' (2 Gall. R., 139. See also 10 Mass., 439; 7 Johns. R., 477; 2 Cranch, 272)."

Affirmed in *Stanford vs. Barry*, 1 Aiken (Vt.), 314.

Lewis vs. Webb, 3 Me., 326, was an appeal by the sureties on an administrator's bond from a decree of the probate court which had become final and was not subject to appeal until an act of the legislature was passed specifically giving them the right of appeal. It was argued in behalf of the appellee that the legislative act was unconstitutional because it disturbed the rights which were already vested under the decree appealed from and was retrospective in its operation. As to this the court, per Millen, C. J., in dismissing the appeal, said (p. 331):

"Whatever may be considered the nature and character of the decree, since the appeal was claimed, it is very clear that, at the time the legislature passed the resolve, it was in full force and virtue; and had

> been for almost five years. The rights of heirs or creditors in the subject-matter of that decree vested when it passed, and so remained undisturbed until the resolve professed to grant the appellants leave to disturb them. The ordinary and legal consequence of an appeal is, to vacate at once, the judgment or decree appealed from. Has that effect been produced in the present instance? Or is the decree of the judge of probate in full force now, and the administrator liable to have a second decree passed against him by this court on the same amount? Such a decree passed in this case by us, would not operate to relieve the administrator from the effect of the existing decree, unless the resolve, and the appeal claimed in virtue of it, have completely vacated that decree; and if it is not vacated thereby, why is it not a bar to all proceedings in this court when relied upon as such. In fact, this appeal cannot be sustained upon any other principles, than that of its having produced the usual effect of an ordinary appeal; that is, having vacated the decree below."

So in the case at bar, under the operation of the final judgment of the supreme court of Hawaii, now here sought to be reviewed, the rights of the parties became fixed and the property had become subject to the absolute and final disposition prescribed in the testator's will. With that property and the rights created thereunder the community had every right to deal. In short, the cause had come to a final end.

In *Gilman vs. Tucker,* 128 N. Y., 190, 204, it was said:

> "We must bear in mind that a judgment has been " rendered and the rights flowing from it have passed " beyond the legislative power, either directly or in- " directly, to reach or destroy. After adjudication " the fruits of the judgment become rights of prop- " erty. These rights became vested by the action of " the court and were thereby placed beyond the reach " of legislative power to affect."

In *Greenwood vs. Butler*, 52 Kans., 424, the question presented was whether an act concerning the sale and redemption of real estate changed or modified a prior judgment directing sale. In holding that the act did *not* so operate the court said (p. 426):

> "Speaking generally, it is the province of the "legislature to establish, within constitutional limits, "the rules, not only of procedure, but for the deter- "mination of rights by which the courts shall be "governed. These rules must, in the very nature of "things, precede the action of the courts in the "orderly determination of the rights of parties. "Those interested in any controversy are given their "day in court. At the appointed time the court "hears their proofs, the presentation of their views "as to the law fixing their rights, and thereupon "proceeds to determine all questions, both of fact "and of law, presented. This determination is "entered of record, and becomes a final settlement "and determination of the controversy. It hardly "seems necessary to cite authorities to support the "proposition that a final judgment so entered is not "to be changed or set aside by the law-making power. "Our form of government does not contemplate an "appeal from the judgment of the courts to the legis- "lature, nor does it contemplate nor authorize, by "a sweeping act of the legislature, a change in the "force and effect of a great class of judgments "already entered."

In *Lewis et al. vs. Webb, Admr.*, 2 Greenleaf, 326, it was held:

> "It is true the resolve does not in terms purport to "transfer property directly from one man to another, "by mere legislative authority, but it purposes to "grant to one party in a cause which has been accord- "ing to the existing laws, *finally decided*, special au- "thority to compel the other party contrary to the "general law of the land, to submit his cause to "another court for trial, the consequences of which

> " *may be* the total loss of all those rights and all that " property which the judgment complained of had " entitled him to hold and enjoy; that is to say, it " proposes to accomplish in an indirect and circui- " tous manner that which the existing laws forbid, " and which by a direct and legal course cannot be " attained and to perform an act respecting a cause " between party and party, an act therefore of a " judicial character, in the simple form of legisla- " tion."

In *Weaver et al. vs. Lapsley*, 43 Ala., 224, the court, after thus citing *Lewis vs. Webb, supra,* adds (p. 231):

> " Here the object and purpose of the act are to " compel the plaintiff in the judgment, sought to be " set aside, to submit his case to another trial by which " a judgment final and absolute, and over which the " court has no authority whatever, may be reversed; " and this contrary to the general law of the land; " the consequence of which may be the total loss of " all the rights and all the property which the judg- " ment complained of entitles him to hold and enjoy, " which is just what the appellant expects and intends " to accomplish and all under the plea, as in that " case, that complete and final justice may be done to " all concerned, for unless the appellant expected in " some way to get rid of the judgment against him, " he would not ask to have the judgment set aside " and a new trial granted; but this Chief Justice " Mullen so ably reasons cannot be done."

Again (p. 232):

> " It is argued by appellant that no one has any " vested right in a defense arising out of the statute of " limitations or the time limited for an appeal. This " is readily admitted, *but he has a vested right in a* " *final absolute judgment, that has passed beyond* " *the control of the courts, as much as he has in his* " *dwelling-house or farm and they are all equally* " *property and entitled to protection alike.*"

In *McCabe vs. Emerson*, 18 Pa. St., 111, it was held (syllabus):

> "The act aforesaid allowing a writ of error by "either party after an adjudication of a former one "taken by the adverse party in the same case, is not "to be applied to a case which had been finally adju- "dicated by the supreme court *before* the passage of "the act, on a writ of error taken at the suit of the "adverse party; as to such a case the act is unconsti- "tutional and void; its application is to be limited to "cases adjudicated by the supreme court subsequent "to the passage of the act."

In *People vs. Carnal*, 6 N. Y., 463, it was held that an act allowing writs of error in behalf of the people in criminal cases "did not authorize a writ of error in behalf of the people where the judgment sought to be reviewed was rendered before the act was passed."

In *Taylor et al. vs. Place et al.*, 4 R. I., 324, a vote of the General Assembly directing suspension of judgment and new trial in a certain cause was held unconstitutional because an exercise of judicial power. This case presents a strong and learned discussion of the separate power exercised by the legislative and judicial departments under a constitution essentially similar to the federal compact.

The question here involved is in no wise analogous to the power exercised by the legislature in respect of the bar of the statute of limitations. Here the controversy betwen the parties had been carried into a court of law; issues had been framed and the cause thus tried to final judgment in the supreme court of the Territory, and had there terminated at a time when no right of further review existed either in this court or in any other tribunal. The statute of limitations, on the contrary, is a bar against judicial action and prohibits the court from hearing and determining a cause because of such limitation.

While it has been ruled that in respect of actions *in personam* the legislature may remove or extend the bar so as to permit judicial determination of the cause, the distinction between such cases and those of the class illustrated by the case at bar is obvious. In the former the aggrieved party may invoke judicial remedy wherein the legislature has thus removed the bar, whilst in the present case the parties have litigated their cause through the judicial forums expressly created by law for these cases, and the cause had reached final determination in the supreme court of Hawaii at a time when the judgment of that court by existing statute was made final, and long prior to the passage of the act of March 3, 1905, authorizing review of causes of like nature in this court. Had this case been pending in the supreme court of Hawaii without final judgment when the act of March 3, 1905, was passed, review thereof in this court, and under that act, would be clearly authorized. But we submit that the act, by its clear terms and on plainest principle, could be applied no further, nor operate to the extent of recognizing present right of appeal in respect of a judgment which had become final for all purposes between the parties long prior to the passage thereof.

Opposing counsel seem to have apprehended the just application of this principle in the present case in their effort to bring a new writ of error from the trial court to the supreme court of the Territory *after* the passage of the act of March 3, 1905. But that writ of error was quashed in the supreme court of the Territory (R., 420-423) upon the obvious ground that such writ sought to bring up again the questions already decided by that court in the cause, and it is most pertinent to observe that neither the petition for writ of error in this court (R., 430-431) nor the assignments of error thereunder (R., 431-433) make mention of any other judgment than the final judgment upon the merits, rendered by the supreme court of the Territory on March

8, 1904, and the subsequent action of that court on June 3, 1904, and August 2, 1904, denying repeated motions for rehearing of the cause. It is hence obvious that such second writ of error sought to be thus taken to the supreme court of Hawaii is without legal effect to bring this case within the operation of the act of March 3, 1905, or the consequent jurisdiction of this court.

The foregoing argument in no manner conflicts with the power of review under legislative sanction to expose fraud and wrong. Fraud vitiates all transactions; even the solemn judgments of courts. It was upon this ground that this court, in *Sampeyreac and Stewart vs. United States,* 7 Pet., 222, sustained an act of Congress authorizing bills of review where the jurisdiction of the court in confirming title was based "in any case on any forged warrant, concession, grant, order of survey or other evidence of title," it appearing that Sampeyreac was a fictitious person, his alleged grant a nullity, and Stewart held incapable of claiming as an innocent purchaser from a non-existent grantor. Such legislation is of course remedial, but legislation which undertakes to revive and reopen litigation *inter partes* theretofore finally closed by providing further appellate review is not remedial in the legal sense, and we submit is not subject to any such application.

We repeat that where the cause is still pending new provisions by constitution or statute concerning procedure may well be applied.

Thus where the proceedings under the judgment have not terminated by performance of requisite acts to vest the right of property, as in condemnation suits, the right of the legislature to direct new inquisition has been upheld. This is illustrated by the case of *Baltimore & Susquehanna R. R. Co. vs. Nesbit,* 10 How., 396, 401, where payment or tender was expressly required by the company's charter which "shall entitle the company to the estate and interest in the same

thus valued * * * ." Years elapsed without such tender or payment and whereupon the legislature directed a new inquisition. This court upheld this legislation upon the obvious ground that no contract was thereby impaired, inasmuch as the company could wholly omit to so pay or tender and could choose some other route, thus stripping the asserted contract of all elements of mutuality. These and similar cases are not however applicable here. The final judgment of affirmance in the supreme court of Hawaii in the case left nothing further to be done. The cause was ended in every possible view.

Respectfully submitted,

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Attorneys for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 346.

WILLIAM NOTLEY AND OTHERS,
PLAINTIFFS IN ERROR

v.

CECIL BROWN AND ANOTHER,
DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR PLAINTIFFS IN ERROR.

Attention is called by counsel for defendants in error on page 14 of their brief to an error in statement made by counsel for plaintiffs in error on page 5 of their brief to the effect that the Hawaiian Statute, R. L. 1905, Sec. 1883, was not in force in 1904.

This statement was based upon information received by the present counsel for plaintiffs in error from Hawaii, the laws of Hawaii prior to the Revised Laws of 1905 not then being accessible to them.

This error, however, is not material in any aspect of this case, because the fact remains that the Supreme Court of Hawaii did not enter judgment in the case when it came before it on bill of exceptions in 1904, and could not have entered it.

The Hawaiian statute of 1905 refers to proceedings coming before the Supreme Court of Hawaii, on writs of error, and not on exceptions.

Meheula v. *Pioneer Mill Co., Limited*, 17 Hawaii, 91.

ROBERT M. MORSE,
WILLIAM M. RICHARDSON,
For Plaintiffs in Error.

No. 68.

Supreme Court of the United States

OCTOBER TERM, 1907

Office Supreme Court, U. S.
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JAMES H. MCKENNEY,
Clerk.

WILLIAM NOTLEY and OTHERS,
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v.

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BRIEF FOR PLAINTIFFS IN ERROR.

ROBERT M. MORSE,
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BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This case comes here on writ of error issued by a justice of this Court, and directed to the Supreme Court of the Territory of Hawaii. (Rec., p. 434.)

The original proceeding was a petition by the defendant in error, Brown, to the judge of the Fourth Circuit, Territory of Hawaii, May 27, 1902, praying for the probate of certain instruments as the will and codicils of Charles Notley, Senior, a resident of Paauilo, Hawaii. (Rec., p. 1.)

Upon this petition the judge of the Circuit Court of the Fourth Circuit sitting at Chambers, September 19, 1902, entered an order admitting the will and codicils to probate, and granting letters testamentary to the defendants in error. (Rec., p. 8.)

From this decree the widow and the four children of the deceased, namely, Charles Notley, Jr., David Fyfe Notley, Maria Hughes, and William Notley, appealed to the Circuit

Court of the Fourth Judicial Circuit, Territory of Hawaii, in term time before a jury September 20, 1902. (Rec., p. 10.)

The case was tried upon the appeal in said Court before a jury January 22 to January 28, 1903, upon the following issues (Rec., pp. 53-71):-

1. Are the documents dated respectively May 18, 1899, August 2, 1900, and April 11, 1902, propounded before the Honorable Gilbert F. Little aforesaid, sitting in Probate at Chambers, as the last will and testament of Charles Notley, deceased, and codicils thereto (and admitted to probate as such by said judge by order dated the 19th day of September, 1902), the last will and testament of the said Charles Notley, deceased, and codicils thereto?

2. Were said alleged will and codicils thereto executed and published by the said decedent Charles Notley as and for his last will and testament and codicils thereto by, under, and by virtue of undue influence exercised by one Emma Danford, residing in the Territory of Hawaii (a beneficiary and devisee mentioned in said alleged will and codicils thereto), over the said Charles Notley, deceased, at the time of the executing and publishing by the said Charles Notley, deceased, of said alleged will and codicils thereto?

At the close of contestants' evidence the defendants in error moved the Court to direct the jury "to find a verdict for the proponents of said will" (Rec., p. 361), and the presiding judge thereupon, against the objection and exception of the contestants, directed the jury to "find for the proponents," and to answer the first question in the affirmative and the second question in the negative. (Rec., p. 363.)

The contestants thereupon, January 28, 1903, filed a bill of exceptions (Rec., pp. 71–82), which was allowed by the presiding judge March 5, 1903. (Rec., p. 82.)

The contestants also, January 28, 1903, filed a motion for new trial, which was denied on the same day. (Rec., p. 365.)

The case on the exceptions was submitted to the Supreme Court of the Territory of Hawaii July 29, 1903, and was decided March 8, 1904. That Court, by a majority decision (two judges concurring and one dissenting), overruled contestants' exceptions. (Rec., pp. 379–407.)

The contestants then, April 6, 1904, moved for a rehearing in the Supreme Court. (Rec., p. 408.) This motion was submitted May 16, 1904, and was denied June 3, 1904, by a majority of the Court (two judges concurring and one dissenting). (Rec., pp. 411–414.)

June 14, 1904, the contestants filed a second motion for rehearing (Rec., p. 414), which was submitted July 20, 1904, and denied August 2, 1904. (Rec., p. 416.)

June 8, 1905, the presiding judge of the Circuit Court ordered the clerk to sign a judgment in favor of the proponents and admitting the will and codicils to probate as of the date of January 28, 1903. [The order for entering up judgment was filed January 29, 1903, but it was then unsigned, and it remained unsigned until June 8, 1905.] The order of June 8, 1905, was made on motion of the defendants in error, and was granted without prejudice to a motion of plaintiffs in error which was made on the same day to set aside the order of January 28, 1903, above stated. (Rec., p. 421.)

The plaintiffs in error thereupon, November 24, 1905, brought a petition for writ of error to the Supreme Court of Hawaii. (Amended Rec., p. 1.) The defendants in error moved to quash this writ of error (Amended Rec., p. 12), and this motion was submitted to the Supreme Court of Hawaii March 22, 1906. April 13, 1906, that Court, by a majority decision (two judges concurring and one dissenting), granted the motion to quash and dismissed the writ of error. (Rec., pp. 420–425.)

On or about April 23, 1906, William Notley, Charles Notley, and Maria Hughes, three of the contestants above

named, filed a petition in the Supreme Court of Hawaii for writ of error from the Supreme Court of the United States "in the above cause," but the Chief Justice denied the application. (Rec., p. 419.)

April 24, 1906, the three contestants above named, plaintiffs in error, applied to the Supreme Court of the United States for a writ of error, their petition alleging that the Supreme Court of Hawaii had entered final judgment in the case. (Rec., p. 430.) This petition was filed June 14, 1906, and the writ of error was thereupon issued by a Justice of this Court, as above stated. (Rec., p. 434.)

The assignment of errors (Rec., p. 431) alleged that there were the following errors in the final judgment of the Supreme Court of Hawaii.

1. In the decision of that Court on the ruling of the Court at *nisi prius* directing a verdict for the proponents of the will.

2. In the decision of that Court that the jury had been properly instructed to find that the will had not been executed and published under or by virtue of undue influence exercised by Emma Danford.

3. In the decision of that Court that the jury had been properly instructed to render a verdict in the form stated.

4. In the decision of that Court quashing the writ of error sued out in that Court November 25, 1905, by the plaintiffs in error and directed to the Circuit Court of the Territory.

In this Court the defendants in error have moved to dismiss the writ of error for want of jurisdiction.

It is necessary first to consider the question of jurisdiction.

I. As to Motion of Defendants in Error to dismiss.

By Act of April 30, 1900, 31 U. S. Statutes, page 141 (Chap. 339 of 1900, Sect. 86), the laws of the United States relating to the writs of error, "as between the courts of the

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United States and the courts of the several States, shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

By Act of March 3, 1905, 33 U. S. Statutes, page 1035 (Chap. 1465 of 1905, Sect. 3), the foregoing was amended by adding, as follows:—

"Provided that writs of error and appeals may also be taken from the Supreme Court of the Territory of Hawaii to the Supreme Court of the United States in all cases where the amount involved exclusive of costs exceeds the sum or value of $5,000."

By R. L. Hawaii, 1905, Sect. 1883, it is provided that the Supreme Court of the Territory

"shall have power to enter such judgment in the case as in their opinion the facts and law warrant." But this statute was not in force in 1904.

It is conceded that the plaintiffs in error proceeded at the outset on the assumption that the decision of the Supreme Court of Hawaii of March 8, 1904, overruling the plaintiff's exceptions, was the final judgment in the case, and that the U. S. Statute of 1905 had a retroactive effect and entitled the plaintiff in error to come into this Court on a writ of error to reverse that judgment. In fact, however, the decision of the Hawaiian Court on the bill of exceptions was not a final judgment, and that Court could not enter a final judgment before the Hawaiian Act of 1905. Even if it had been or could be considered to be a final judgment, the decision of this Court in *Harrison* v. *Magoon* (205 U. S. 501) to the effect that the U. S. Statute of 1905 was not retroactive would deprive this Court of jurisdiction.

It appears, however, that on June 8, 1905, a judgment, and the first judgment in this case entered by any court, was en-

PAGE CUT OFF

tered in the Circuit Court of Hawaii (Amended Rec., p. 5) and that the plaintiffs in error thereupon applied to the Supreme Court of Hawaii for a writ of error to the Circuit Court, which writ of error was granted under date of November 24, 1905 (Amended Rec., p. 11), and, on motion by defendants in error to quash the same, was dismissed April 13, 1906, and that judgment thereon was entered September 27, 1907, as of April 13, 1906. (Amended Rec., p. 13.) (Rec., p. 420.)

The plaintiffs in error submit that this judgment of the Hawaiian Court was, in effect, an affirmance of the judgment of the Circuit Court, and was, for the purpose of a writ of error to this Court, a final judgment in the case by the Supreme Court of Hawaii.

The plaintiffs in error further submit that the entire record of the case is now before this Court, and that, if it appears from inspection of the record that substantial error has been committed, to which seasonable objection was taken by the plaintiffs in error, this Court has the power to correct and will correct such error.

Gregory v. *McVeigh*, 23 Wall. 294, sustains the proposition that the decision of the Supreme Court of Hawaii of April 13, 1906, was, in effect, an affirmance of the judgment of the Circuit Court. In that case the judgment of the lower court could be taken to the Court of Appeals for review only by leave of the Court of Appeals or of some judge thereof. The plaintiff, against whom a judgment had been rendered in the lower court, applied to every judge of the Appellate Court for a writ of error, but every application was rejected, whereupon the plaintiff sued out a writ of error from the United States Supreme Court to the lower court as the highest court of the State in which a decision in the suit could be had. Upon a motion to dismiss, this Court sustained its jurisdiction on the ground that the plaintiff had done everything that he could do to take his case to

the Court of Appeals, and that the judgment below thereby became the final judgment of the highest court. The Court said:—

"Had the Court itself refused the leave upon an application for that purpose, its refusal would have been equivalent to a judgment of affirmance which could have been reviewed in this Court."

So, in the case at bar, the plaintiffs in error did everything that they could, and seasonably, to effect a review of the decision of the Supreme Court, March 8, 1904, and of the judgment of June 8, 1905. The action of the Supreme Court of Hawaii in dismissing the writ of error directed to that judgment was equivalent to a judgment of affirmance and one which can be reviewed by this Court.

In *Fisher* v. *Perkins*, 122 U. S. 522, it was held that a review of a final judgment of a lower court could not be entertained until it appeared that application for such review had first been made to the Appellate Court and refused.

The entire record in the case is before this Court, and inspection of the record shows that substantial error has been committed.

It may be claimed that the plaintiffs in error are limited by the language used in the petition for writ of error and accompanying assignment of error to a review of the alleged judgment of March 8, 1904. But it is submitted that the Court will treat the phrase March 8, 1904, as descriptive only and surplusage, and will give effect to the apparent intention of the plaintiffs in error to enforce their right to a review of the final judgment in the case by the highest Court of the Territory.

The power of the Court to review does not depend upon the presence or absence of any specific assignment of error.

World's Columbian Exposition Co. v. *Republic of France*, 91 Fed. Rep. 64.

Rule 35 of the Supreme Court is to the effect that the Court will notice plain errors, even though not assigned, and this Court has frequently considered such errors,

U. S. v. *Pena*, 175 U. S. 500,

and even when no assignment of errors has been filed.

Farrar v. *Churchill*, 135 U. S. 609.

In *Behn* v. *Campbell*, 205 U. S. 403, certain errors of law not contained in the assignment of errors were submitted by defendant in its brief and argument. This Court in referring thereto said:—

"Alleged errors not stated in the assignment of errors filed with the petition for the writ, have sometimes been considered. The limit of this practice is accurately stated in the thirty-fifth rule of this Court. There it is said that, if errors are not assigned with the petition for the writ, they will be disregarded, except that the Court in its option may notice a plain error not thus assigned.

"But we find no such plain error in the opinion of the Supreme Court as warrants us in reversing its judgment. The findings of fact made by that Court support and require the judgment which it rendered."

This Court does not consider mere technicalities of practice, but seeks, where the entire record is before it, to review and correct such errors as may be assigned and such manifest errors as may otherwise be brought to its attention. The purpose of the assignment of errors is, of course, to inform the Court and opposing counsel as to the particular errors complained of, but where the error, although not assigned, is manifest and where the intention of the plaintiff in error is perfectly apparent, it is submitted that this Court will not refuse consideration because the error may not have been technically assigned.

It may be claimed, however, that because the judgment of the Hawaiian Court was the quashing of a writ of error on a motion to dismiss, it was not such a judgment as can be reviewed by this Court. No limitation as to the kind or character of the judgment to be entered is imposed by Act of Congress of 1905 or by the Hawaiian Act of 1905, and it is therefore to be assumed that the same rules and practice are to prevail as in cases between Federal and State Courts.

In *Williams* v. *Bruffy*, 102 U. S. 248, where the State Court refused to issue a supersedeas on a writ of error under a statute giving it the power to issue it if it deemed the decision below wrong, this Court said:—

"Whenever the highest court of the State by any form of decision affirms or denies the validity of a judgment of an inferior court over which it can by law exercise appellate authority, the jurisdiction of this Court to review such decision . . . will, upon a proper proceeding, attach. It cannot make any difference whether, after an examination of the record of the court below, such decision be expressed by refusing a writ of error or supersedeas or by dismissing a writ previously allowed."

The test as to what constitutes a final judgment to which a writ of error can be taken is whether in entering such judgment the Court was affirming or rejecting a claim which the plaintiff in error sought to enforce as a matter of right, or whether it was one which the Court in the exercise of its discretion might allow or not.

Walden v. *Craig*, 9 Wheat. 510.
Pickett's Heirs v. *Legerwood*, 7 Peters, 142.
Shreve v. *Cheesman*, 69 Fed. Rep. 785.
Whitworth v. *U. S.*, 114 Fed. Rep. 302.

In the case at bar the plaintiffs in error claimed the right to a review of the judgment of June 8, 1905, as a matter of

right, and set out nine assignments of error, each raising questions of law. (Amended Rec., pp. 8–10.) Nothing but questions of law were therefore before the Supreme Court of the Territory. Therefore, its judgment in dismissing the writ of error, which, as we have said, is equivalent to a decree of affirmance, is reviewable by this Court.

It appears from the Amended Record, p. 13, that judgment dismissing the writ of error was in fact entered September 27, 1907, but of the date of April 13, 1906. This case falls within the U. S. Act of 1905.

This Court has many times held that, where a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law.

Railroad Co. v. *Grant*, 98 U. S. 398.
Gurnee v. *Patrick County*, 137 U. S. 141.

The converse must also be true, that, where a law granting jurisdiction is enacted without any reservation, all pending cases fall within the law, and this principle appears to be recognized by the opposing counsel at page 191 of their brief filed on the motion to dismiss this writ of error where it is said:—

"Had this case been pending in the Supreme Court of Hawaii without final judgment when the Act of March 3, 1905, was passed, the review thereof in this Court and under that Act would be clearly authorized."

If this Court should be of opinion that the writ of error can bring up only the proceedings in the Hawaiian Courts subsequent to the entry of judgment of June 8, 1905, it is still claimed that the writ of error should be sustained for the reason that the Supreme Court of the Territory in dismissing the writ of error did so upon the ground that all the errors assigned in the petition had been passed on by it on March 8, 1904. But the sixth and seventh assignments

relate to the proceedings in the lower court had since March 8, 1904, and therefore could not have been passed upon by the Appellate Court. (Amended Rec., p. 10.)

See also dissenting opinion of Hartwell, J. (Rec., p. 423.)

II.

As to the Merits of the Case.

The appellants submit that the Circuit Court erred in instructing the jury to answer the issues in favor of the proponents, and that the Supreme Court of Hawaii erred in approving this instruction.

This was a plain error, vitally affecting the rights and interests of the plaintiffs in error.

There was evidence proper for the consideration of the jury, and which should have been submitted to the jury, tending to prove that the will was procured by the undue influence of Emma Danford, and the uniform decisions of this Court and of the Courts of all the States support this contention.

The will was executed May 18, 1899, the first codicil May 2, 1900, and the second codicil April 11, 1902.

The testator died May 2, 1902, at the age of eighty years. (Dr. Herbert, Rec., p. 19.)

He was an Englishman by birth, but an old resident of the Hawaiian Islands. He began life as tender of sheep for Samuel Parker (Rec., p. 85), and he was employed in this capacity when he married a Hawaiian woman. (Rec., p. 85.) He next established a tannery and small store at Waimea (Rec., pp. 100, 101), and his wife and family helped to make the business a successful one. (Rec., pp. 86, 87, 101.) With their assistance he began to acquire property, and he bought the home at Paauilo. (Rec., p. 101.)

In the fall of 1877 he began planting cane at Hamakua. (Rec., p. 120.)

He had five children: four sons, Charles, David, Thomas (deceased), and William; and a married daughter, Maria Hughes. He had also several grandchildren.

His wife and children rendered him valuable services and helped him to acquire his property. (Rec., pp. 87, 88, 89, 104, 106, 107, 121, 122, 123, 124.)

His wife, his daughter, Mrs. Hughes, and his daughter-in-law, wife of his son Charles, took charge of the household affairs. (Rec., pp. 101, 102, 104, 105, 121, 128.) They assisted in beautifying the homestead by planting and caring for the trees and flowers. (Rec., pp. 159, 283, 284), and by their sympathy, industry, labor, and economy they contributed to the success of the testator.

Notley recognized the interest of his sons by carrying on the business in the name of "Charles Notley & Sons." (Rec., pp. 88, 89, 106, and Exhibits 17, 18, 19.) (Rec., pp. 358, 359.)

The result of these combined labors and economies was the accumulation of a substantial property, amounting to from $350,000 to $400,000, which was left by testator at his decease.

Prior to 1885, when Emma Danford, then Emma Mullinger, was brought to Hawaii, the family had been contented, harmonious, and affectionate. The conduct of Notley towards his wife had been marked by special courtesy and consideration. (Rec., pp. 103, 104.)

In 1885 Notley went to England, and there met his niece, Emma Mullinger, who was then about fourteen years old. As he states in Ex. 8 (Rec., p. 370), he thought her "a very nice girl," and was pleased that "she is crazy to come with me." (Ex. 7, Rec., p. 369.) Although "her mother did not like her to go," he writes that she "still holds out that she would go with me and leave father and mother forever." (Ex. 8.)

Her advent produced a marked change in the family rela-

tions, and these changes continued and became more serious every year until the death of the testator, seventeen years afterwards.

She began to direct matters as soon as she arrived in Honolulu. (Rec., pp. 260, 310, 311.)

There was evidence tending to show that from the beginning Notley was captivated by the appearance and attractions of the girl, and was subservient to her wishes and that he lavished his affections upon her.

He installed her at once as the head of his household, and degraded his wife to a subordinate position, which she continued to occupy from that time.

"He said that he was going to install Mrs. Danford as mistress of the house, and mother stayed there, and I told mother you are (speaking in Hawaiian, then in English). 'A white lady is to be in as mistress.'

"*Q.* What did she say? . . .

"The COURT. Will you state what you said to your mother in the Hawaiian language? . . .

"*A.* The white lady has been chosen the head of the house.

"*Q.* What did your mother say? *A.* She said, 'Pela, is that so?'

"*Q.* What did she say further? *A.* She didn't say anything further, but went away." (*Charles Notley*, Rec., pp. 238, 239.)

She insulted the old wife in Notley's presence, and encouraged him to strike her and drive her from his presence.

"*Q.* What date was this? *A.* In 1888.

"*Q.* What month? *A.* In January.

"*Q.* What was said by any one at the time he struck her? *A.* Miss Mullinger sang out to her uncle, 'Drive that black woman out of the yard, do, uncle, do.'

"*Q.* After he struck his wife, what happened to her; you said she fell down? *A.* Yes.

"*Q.* What did he do next? *A.* He tried to strike her again, but Mr. Notley, Jr., crossed his hands and held him back.

"*Q.* What happened then? *A.* The son, Mr. Notley, Jr., took hold of the father and took him around the house, and, as they were turning around the corner of the main building, then he commenced to collapse.

"*Q.* Who? *A.* Mr. Notley, Sr., he cried and said, 'Why did I do this?' I did not hear anything further because they were out of my hearing.

"*Q.* And Charles was leading him away? *A.* Yes.

"*Q.* What was the condition of your mother when she got up? *A.* She was in a stupor.

"*Q.* Where did he strike her? *A.* The back of the neck here (showing).

"*Q.* What effect did it have on her? *A.* She collapsed right away and fainted." (*Emma Notley*, Rec., pp. 144, 145.)

"I was standing at the entrance of a little off-house we had adjoining the main building, when I heard my father's loud voice calling at my mother, and the rattling of plates and knives, and I rushed around the building, and got there in time to see him strike mother down and raise his hand again, and I held him back and said, 'Father, don't strike mother.' Then he turned around as if out of his head, like mad, and I held him and he said, 'Oh, why did I do that? I am like a brute. Why did I strike my poor old wife?' Then I took him away, and we walked over to the parlor, on the steps there, and he said, 'Charlie, why did I do that?'"

"*Q.* What was he doing at the time he talked to you? *A.* He was weeping and felt awful sorry.

"*Q.* Where was your mother after that? *A.* She got up from a fainting fit, had her face washed of the blood, and I got them together again, and we talked it over. . . .

"*Q.* When he struck her, where was Miss Mullinger? *A.* By the pear-tree.

"*Q.* Did she take any part in it at all? *A.* The part she took was in calling out, 'Do drive that black woman out of the yard.' . . .

"*Q.* What date was that? *A.* January 27th or 29th of 1888." (*Charles Notley*, Rec., p. 226.)

When Notley, suddenly repenting of his treatment of his wife, proposed to remove Emma and return her to England, she had sufficient influence over him to prevent the removal, returned to his house, and was reinstated as mistress. (*Chas. Notley*, Rec., p. 227; *Emma Notley*, Rec., p. 146.)

The testator struck his wife a second time when Mrs. Notley objected to Emma's insisting upon having her friend Miss Barnard in the house.

"*Q.* When did you first hear this discussion going on between your grandmother and grandfather? *A.* Soon after Mrs. Danford said something about it.

"*Q.* After her arrival? *A.* Yes, that is the first time.

"*Q.* Had your grandfather, between the date of the marriage (of Mrs. Danford, October, 1898) and February, when Mrs. Danford came, between those dates, had he ever suggested that he needed a housekeeper? *A.* Not to my recollection." . . .

"*Q.* Were you there the day that Mrs. Danford left Paauilo to go back to her husband on that visit? *A.* In February?

"*Q.* Yes. *A.* Yes, sir.

"*Q.* What happened that morning, if anything? *A.* Grandma didn't want grandpa to go.

"*Q.* Was he going? *A.* He was going, he had an intention of going.

"*Q.* How do you know that? *A.* He had prepared to go." . . .

"*Q.* When did you first learn your grandfather was going back with her, that he was planning to go back with her? *A.* One or two evenings before.

"*Q.* Who did you learn it from? *A.* Mrs. Danford told me he was going to accompany her.

"*Q.* Had you heard it before that evening? *A.* Only from Mrs. Danford.

"*Q.* On the day that he started to go what happened? *A.* Grandma wouldn't let him go.

"*Q.* Tell what happened? *A.* She told grandpa she didn't want him to go. Grandpa insisted on going; I don't know what happened, but I know I had to sew some buttons on his vest.

"*Q.* Did you hear any noise first? *A.* Yes, I heard grandma speaking in Hawaiian, telling him she didn't want him to go. He was to stay home, she didn't want him to go with the white lady.

"*Q.* Did she say white? *A.* Because she had a husband of her own, that she didn't want a white lady to be taking her husband away, to escort her home.

"*Q.* What was your grandmother doing when you arrived? *A.* She had hold of grandpa when I came out after the noise I heard." . . .

"*Q.* What was she doing? *A.* Telling him he was to stay home and talking very loud.

"*Q.* Did she make any other noise? *A.* She wailed.

"*Q.* What was Mrs. Danford doing? *A.* She was in the bedroom.

"*Q.* What did she do before she went in the bedroom? *A.* I did not see it, but she told me—

"*Q.* Already she told you? *A.* She told me grandmother pushed her.

"*Q.* Where was the carriage then? *A.* Out in the drive under the pear-tree, near the pear-tree." . . .

"*Q.* And what became of Mrs. Danford? *A.* She drove away with the Japanese man.

"*Q.* What frame of mind was she in, what was her appearance when she came out and started to drive away? *A.* She had been crying before that.

"*Q.* Was her condition then, was she calm or excited, pleased or angry or what? *A.* I don't think she was pleased."

"*Q.* What did she say? *A.* She said, 'Good-by' to me.

"*Q.* Did she say anything about the place? *A.* She said it would be the last time she would come there." . . .

"*Q.* Did you notice any trouble between your grandfather and grandmother after she left? *A.* I think it was a week after, I am not sure about, but I know there was some trouble.

"*Q.* What was the trouble? *A.* About Miss Barnard. That is the day grandpa struck grandma." . . .

"*Q.* Where were they when he struck her? *A.* In the bedroom."

"*Q.* What was the result of that striking? *A.* Grandma's eyes were swollen." . . .

"*Q.* What did you hear leading up to the striking? *A.* Something about pictures and Miss Barnard." . . .

"*Q.* How long was she marked that way with the blow, how long did it show? *A.* Quite a while." *V. M. K. Notley* (Rec., pp. 323, 324).

To same effect *Lily Notley* (Rec., p. 342).

John Notley, grandson of the testator, testified: "I was standing on the makai side of the railing as you left the main house, and grandma got between to push grandpa in a chair, and it happened she shoved Mrs. Danford and Mrs. Danford was pushed back.

"*Q.* What, if anything, did Mrs. Danford say at the time? *A.* She seemed to be mad to me.

"*Q.* What, if anything, did she say to your grandmother?

A. 'Who is this woman that I should listen to her?'" (Rec., pp. 352, 353.)

Tavares, a Portuguese boy, testified as follows:—

"*Q.* How frequently would you find her (Mrs. Notley) talking to herself? *A.* A good many times she was talking.

"*Q.* Have you ever seen the old lady and Mr. Notley talking together? *A.* Many times.

"*Q.* Where? *A.* Different places. Sometimes talked near the iron room, sometimes at Mr. Notley's veranda, and sometimes near by the lawn tennis court.

"*Q.* The lawn tennis court? *A.* Yes, sir.

"*Q.* Have you on any such occasion seen Miss Mullinger? *A.* Yes, sometimes Mr. Notley is talking with Mrs. Notley, and afterwards I hear sometimes a voice say 'Uncle,' and call for Uncle and call for Uncle, and Uncle would let Mrs. Notley alone and walk away.

"*Q.* How often did you see that done? *A.* A good many times in all that time I had been there.

"*Q.* Well, you say that you heard a voice? Whose voice was it calling 'Uncle'? *A.* Mrs. Danford's voice.

"*Q.* Had you on any such occasions seen her? *A.* Yes, I had.

"*Q.* Under what circumstances? *A.* Sometimes she would be at the back yard calling 'Uncle,' sometimes on the below side of the iron room, sometimes from Mr. Notley's house, that is where the voice comes out. Sometimes I do hear Miss Mullinger again calling 'Uncle,' and then Mr. Notley has to go.

"*Q.* When he is in conversation with his wife? *A.* Yes.

"*Q.* In this conversation—did you ever hear this conversation? *A.* No, sir. I never stayed nearby.

"*Q.* Was there anything to indicate whether they were angry or pleased? *A.* It seems to me they were not angry.

"*Q.* Why not? *A.* Because Mrs. Notley is always too broke down." . . .

"*Q.* How was Mr. Notley in this conversation? *A.* He was in his own way, that is all right on his side. There is no sorrow with him." . . .

The COURT:—

"*Q.* What do you mean by no sorrow in him? *A.* When he talks, Mr. Notley, he talks like he felt he has no sorrow." (Rec., pp. 184, 185.)

Again:—

"*Q.* Mr. Tavares, where did Mrs. Notley spend most of her time in the yard? *A.* Most of the time at the ironing-room, doing the washing in the washing-room, and most of the time in the ironing-room."

"*Q.* Did you see her often when she was there in those places?

"*A.* Yes, sir.

"*Q.* What was she doing besides ironing and washing, if anything? *A.* She is always got something to do; that is, ironing and washing. But while she is having a rest, maybe she has not clothes to iron. Lots of time she cry.

"*Q.* Was any one ever present besides yourself or near by on any of those times when she was crying? *A.* Well, sometimes I was to cut by the machine the tennis play grass, sometimes she was crying. Sometimes Mr. Notley was alongside, sometimes Miss Mullinger, and I could see and hear she is crying, because she is not so far from the tennis play.

"*Q.* How many times have you heard her cry when Miss Mullinger was present? *A.* I can't tell how many times, because I never take any notice.

"*Q.* Was it many or few times? *A.* It was not a few times. It was many times.

"*Q.* What attention, if any, did Mrs. Danford pay to this crying? *A.* It looked to me no attention.

"*Q.* Did you see or notice any attention on her part? *A.* I never saw it.

"*Q.* Did she do anything besides cry? *A.* Sometimes she talked by her own self. Cry and talk." (Rec., pp. 183, 184.)

While the wife was washing and ironing, Emma was entertaining her friends at lawn tennis. (Rec., p. 156.)

Her tennis court was built in the place from which she had torn up Mrs. Notley's roses. (Rec., p. 191.)

"*Q.* Were you present when any of these roses were removed? *A.* I was present on a part of it.

"*Q.* Which part of it? *A.* On the below side of the sidewalk, into the house on the makai side.

"*Q.* Tell us what happened. *A.* As I was there with my father, my father was told by Mr. Notley to pull those rose-bushes off.

"*Q.* Who was present when Mr. Notley told your father that? *A.* Mrs. Danford was present with Mrs. Notley." . . .

"*Q.* When he told your father to pull up the roses, what then? *A.* My father had gone to do the work. Then Mrs. Notley came down and talked with Mr. Notley. Then she was not crying, but you could see the tears rolling down her cheeks.

"*Q.* Was she talking English or Hawaiian? *A.* She was talking Hawaiian,—well, of course, she can't talk English. I know she must have been talking Hawaiian.

"*Q.* Where was Mrs. Danford when the old lady and Mr. Notley were talking? *A.* At the time Mrs. Danford got there, Mrs. Notley and Mr. Notley was together. After that Mrs. Danford walked in the house.

"*Q.* How long after Mrs. Notley started talking to Mr. Notley that Miss Mullinger went into the house? *A.* I can't tell, but it is about five minutes or so. Just a short time.

"*Q.* How long was she gone? After Miss Mullinger went into the house, what became of her? *A.* She got back in five or seven minutes.

"*Q.* When she came back there, where was Mr. and Mrs. Notley? *A.* Well, when Mr. Notley,—when she came back, they were talking to one another still.

"*Q.* What happened after Mrs. Danford came back? *A.* They stayed there for a little while. Mrs. Notley left Mr. Notley, and was crying hard, telling,—that is, after this job was done Mrs. Notley told me—

"*Q.* You can't tell that. When Mrs. Danford came back, what did she do? *A.* Talked with Mr. Notley.

"*Q.* After she talked with Mr. Notley, what was done? *A.* 'Go ahead, Jose, and pull all of those rose-bushes.' (*Tavares*, Rec., pp. 187, 188.)

"They were always together." (*Emma Notley*, Rec., p. 140.)

"She is the first that he would offer his assistance to." . . .

"*Q.* How was it when his wife was present? *A.* Well, he would offer her the first assistance.

"*Q.* Who do you mean by 'her'? *A.* This Mrs. Danford." (*Emma Notley*, Rec., pp. 141, 142.)

"*Q.* What other evidences of affection did you see between the two that first six months? *A.* That is all I can recollect, being closely together.

"*Q.* How close together? *A.* Sitting around and going out riding.

"*Q.* What was done in the evenings during that first six months Miss Mullinger was there? *A.* He would occupy most of his time with Miss Mullinger. . . .

"How did the old gentleman greet Miss Mullinger in the morning? *A.* She would come up and kiss him.

"*Q.* Did she kiss him often? *A.* Very.

"*Q.* How, in what way? *A.* 'Good morning, dear

Uncle,' that is her greeting the first thing in the morning and the last thing when he retired.

"*Q.* 'Good morning, dear Aunt,' too? *A.* No." (*Emma Notley*, Rec., p. 142.)

"He paid more attention to her. Whenever she wanted anything it was bought.

"*Q.* Tell us any one thing he bought for her in 1886? *A.* Finery, jewelries, fine dresses, hats, jewels, watch and gold chain, and everything in 1886.

"*Q.* That was all you took offence at, was it? *A.* And in the house the way she acted. I never saw her greeting my mother-in-law.

"*Q.* In what way did she pay attention to Mr. Notley? By doing what? *A.* Yes, trying all the loving ways she can charm him." (*Emma Notley*, Rec., p. 163.)

After Emma was installed as mistress of the house, the testator's relations with his sons also changed. Before that time Notley was not only an affectionate father, but he took pride in his family. (Rec., pp. 87, 103, 125.) After Emma's accession his interest in his sons waned. (Rec., p. 141.)

His son Charles and his family had lived with the father in the main house, but, after Emma came, at her instigation, they were ordered out and expelled (first occasion, Rec., p. 224; second occasion, Rec., p. 225).

Notwithstanding that the sons had assisted largely in building up the family fortune, yet after Emma's arrival the boys were gradually pushed out. Charles was driven out, as above stated; David was suffered to go adrift. (Rec., pp. 107, 292.) The testator complained of what it cost him to take care of William. (Rec., p. 275.) When he required their services, he treated and paid them as strangers. (Rec., pp. 288, 293.) While the testator was living in Emma

Danford's house in Honolulu, he defamed his son Charles to Mr. Andrade (Rec., p. 98), and this was in line with his former conduct when Emma had caused him to believe that Charles had criticised her friends unfavorably. In fact, Charles had not spoken against them. (Rec., pp. 233, 234, 257, 258.)

Not only did Emma receive presents as above stated from him, but, when he distributed $5,000 each to his children, he gave Emma property of the value of $6,000 (Rec., p. 251), and on top of that she got $2,000 from him (Rec., p. 297).

A characteristic instance showing her control over the testator is the following:—

"*Q.* Do you know the horse owned by Mrs. Danford, the carriage horse? *A.* Yes, I do.

"*Q.* Do you know how she got that? *A.* Yes.

"*Q.* How was that? *A.* Mrs. Danford and —— went out driving on Sunday, and when she came home she wanted the horse.

"*Q.* Who wanted the horse? *A.* Mrs. Danford.

"*Q.* Yes? *A.* And she was telling me that she liked the horse very much, and told me she was going to ask my father for it. I said, 'I don't think you can get it.' 'Oh, that's all right: I will get it just the same.' After a while I seen the horse in her possession." (*David Notley*, Rec., p. 285.)

Maria A. Hughes, granddaughter of the testator, testified that in 1897 she made a visit of three weeks to the testator's house. Emma Mullinger was then about twenty-six years of age. This was the year preceding her marriage. Miss Hughes testified that during the first part of her visit her grandfather spoke nicely to her, and treated her with the same affection as he did the others.

"*Q.* Had you shown any affection to him during that time? *A.* Returned it in kind.

"*Q.* Any other mark of affection at any time? *A.* One I remember distinctly was sitting on his lap.

"*Q.* What happened then, if anything? *A.* Mrs. Danford objected.

"*Q.* What did she say? . . . "*A.* She said it was not a ladylike position for me to be in." . . .

"*Q.* What happened then? *A.* I went away.

"*Q.* Did you ever see any attentions between her and the grandfather? *A.* I did.

"*Q.* What did you see? *A.* When I came back in company with my cousin, Mrs. Danford was in the position I had left.

"*Q.* Which of you two were the oldest, Mrs. Danford or yourself? *A.* Mrs. Danford." (Rec., p. 197.)

Emma Mullinger's conduct, attitude, and declarations all indicated that she understood the position of influence and control which she had secured and meant to retain it.

She claimed at one time, although there was nothing then or since to support her claim, that she had been adopted by Mr. Notley.

"She testified that in England they went to a hotel in London and there he gave her papers of adoption.

"*Q.* In a hotel in London? *A.* In a hotel in London. And she took it and put it in her trunk, and that is the last time she looked at it until she told us of it in Court.

"*Q.* Did she say whether or not she mentioned these articles of adoption as soon as they were signed in London? *A.* Only once.

"*Q.* When was that? *A.* When we had that little row before the wedding." (*Charles Notley*, Rec., p. 24.)

Before Emma's coming, Mrs. Notley entertained her hus-

band's guests (Rec., pp. 86–91, 101, 102, 103, 127). After Emma took charge, all this was changed. Emma lived in the homestead and controlled it. The wife spent her days in the small house in the yard. (Rec., pp. 133, 134, 149.)

Emma's luxurious life as contrasted with the laborious life of the family distinctly appears. (Rec., p. 343.)

Emma's feeling toward Mrs. Notley is shown by her ordering or permitting her servant to burn Mrs. Notley's photographs just before her (Emma's) marriage (which occurred in October, 1898). (*Emma Notley*, Rec., pp. 149, 152, 174–176.)

Emma's influence changed the plans of the house.

"*Q.* How long had you been there putting that addition on to the building? *A.* Two or three months.

"*Q.* Who made the plans for it? *A.* My father had the plans made first.

"*Q.* Were those plans carried out? *A.* It was all changed.

"*Q.* Who changed it? *A.* Miss Mullinger." . . .

"*Q.* Why did they change? *A.* Well, I told my father not to have it that way, but he wouldn't take my advice, but at table we were talking over it and she suggested just what I wanted.

"*Q.* What is that? *A.* Miss Mullinger, she suggested what plan I wanted and my father agreed to it then." (*David Notley*, Rec., p. 284.)

Shortly before her marriage (1898) the testator insisted on accompanying her to Honolulu against his wife's objections, and was only prevented from going by his wife's cries and remonstrances. *V. M. K. Notley* (Rec., pp. 320, 321, 334); *Lily Notley* (Rec., pp. 340–41).

"Emma told my cousin in 1897 '*she was more to my grandfather than my mother was.*'" (*Maria A. Hughes*, Rec., p. 195.)

She falsely claimed that she had caused the children of Charles Notley to be educated. (Rec., p. 153.)

October 17, 1898, a few months before the will was made, and the day before her wedding she told Charles that she would see that he got nothing out of the property. "I said to her that I had come back from Honokaa, and that I had seen something there I thought was not right. She said she didn't know. I told her there was property in Honolulu bought in her name. I told her that 'since you have been here, father has gone and done that, and I don't think it is right, bought property in your name.' She said, 'I am not aware of it.' I said, 'Probably you are not aware of it; however,' I said, 'it is—about my father doing an act which is not right towards my mother, and I think you have cast such an influence over him that he has committed this act.' She then said, '*Well, if that is the way you think of Uncle, I will see that you don't get anything out of this property.*'" (*Charles Notley*, Rec., pp. 230, 231.)

As will appear hereafter, Charles gets nothing by the will. EXCEPT AN ANNUITY

She equivocated as to her knowledge of the provisions of the will, first testifying that she had no knowledge of it, but finally admitting that the testator had told her that she was going to have the homestead. (*Charles Notley*, Rec., pp. 240, 241.)

Again in February, 1899, a short time before the will was made, she told the son, Charles, that she would see that Miss Barnard got something out of the property.

"*Q.* Who was present when Mrs. Danford said, 'I will see that Miss Barnard gets something out of this property'? *A.* My father was present.

"*Q.* So he could hear? *A.* He could hear perfectly plain. It was a loud voice.

"*Q.* How close were they to each other? *A.* Father was sitting here (showing), and she was there right close to the arm-chair, and she stood there after she made the statement to father, and he said, 'Get back, get back.'" . . .

"*Q.* What was her manner when she said that to you? *A.* She seemed to be worked up like, seems strong—she seems to be more like one not mad, defiant-like." (*Charles Notley*, Rec., p. 241.)

Miss Barnard received a legacy under the will.

A significant proof of her influence over the testator is shown by his varying attitude towards his family according to whether Emma was or was not present with him.

December, 1900, at Mrs. Hughes's home, Emma not being in town, Notley was very pleasant and affectionate. (Rec., pp. 299–302.)

April, 1901, Emma then being in town, his manner was cool and indifferent to his family. (Rec., pp. 200, 201, 202.)

October, 1901, he stayed at Emma's house, refused his daughter's (Mrs. Hughes's) invitation to visit her, made short calls upon her, and, when he called, he acted as if he was in a hurry. His manner was not friendly. When he passed the house alone, he would wave his hand or bow, but when Emma was with him he neither looked nor spoke. (Rec., pp. 202–205.)

His last visit to Honolulu was in April, 1902. He then stayed at Mrs. Danford's house, and there executed the second codicil which contains the important clause by which the homestead property is taken from one of the sons, to

whom it was given by the original will, and given to Mrs. Danford, reserving to his wife the right to occupy a small house upon the premises.

He died at her house. But Mrs. Danford showed her lack of real affection and respect and demonstrated the selfishness of her interest in and of her control over him by causing his body to be removed to an undertaker's shop. (Rec., p. 242.)

There was abundant evidence that Mrs. Danford was a clever and attractive girl, well educated, and assuming to be socially superior to the members of the testator's family; that she appreciated the opportunity of captivating the testator, of rendering herself indispensable to him, and of securing influence and control over his actions and the distribution of his property; that she continuously and to the end asserted her will, and that her influence and control continued and increased until his death. She pushed aside his wife, sons, daughter, grandchildren, and old Hawaiian friends to make way for her friends; and Notley, flattered by her attentions and submissive to her wishes, sacrificed his old associations, ties of kindred and family affection and obligations, to please her.

The WILL and CODICILS were also evidence of the undue influence and the increasing undue influence of Emma Danford.

THE WILL was executed May 18, 1899.

The *first* clause gives $1,000 to Miss Barnard, who apparently had no claim on testator except as the friend and protegée of Mrs. Danford.

The *second* clause gives $500 to the testator's brother John, with provisions for the payment of the legacy to other persons in case his brother died before the testator.

The *third* clause gives $500 to John Mullinger (father of Emma Danford).

The *fourth* clause gives to his son David the homestead at Paauilo and furniture therein. (Subsequently revoked.)

The *fifth* clause gives the proceeds of a life insurance policy to his wife, his children (omitting Charles), and Emma Danford, in equal shares.

The *sixth* clause gives the residue of the estate to trustees to pay the income: one-sixth to his wife during her life, and upon her death among the surviving devisees, one-sixth to his son William, one-sixth to his daughter and his son Charles, one-sixth to his son David, and one-sixth to Emma Danford. Upon the death of all his children and of Emma Danford the trustees are directed to convey the estate among the heirs of his children William, Maria, and David, Emma Danford, and of the children of his son Charles in equal shares. (Rec., pp. 2–4.)

The *FIRST CODICIL*, executed May 2, 1900, revokes the appointment of Walker as executor and trustee, and nominates Cecil Brown in his place.

The *SECOND CODICIL*, executed April 11, 1902, revokes the devise of the homestead and furniture in the fourth clause to David, and gives the same to Emma Danford, with a proviso that his wife may occupy a cottage which is on the homestead premises.

The most striking features of the testamentary instruments, tending to establish undue influence, are the placing of Mrs. Danford above his wife and children, the gift of the homestead to Mrs. Danford, and the degradation of the wife to a life tenancy of a small house on the homestead premises.

Upon this evidence a jury would have been warranted in finding for the contestants.

This evidence should have been submitted to the jury, and the refusal of the Court to submit the evidence to the jury, the approval of that action by the Supreme Court of Hawaii in overruling the exceptions of plaintiffs in error, and its subsequent confirmation of that approval in quashing the

plaintiffs' writ of error constitute a plain error, entitling the plaintiffs in error to a reversal of the judgment of the Supreme Court of Hawaii.

The majority opinion of the Court is based on a fundamental error; to wit, that the question raised by the contestants' exceptions "*is whether there was sufficient evidence of undue influence to go to the jury.*" (Rec., p. 380.)

The real question was stated in the dissenting opinion of Judge Galbraith, as follows: "*Not whether the evidence shows that the will and codicils were executed under and by virtue of undue influence exercised by Mrs. Danford, but whether there is any evidence from which the jury may have reasonably inferred that such undue influence was exercised.*" (Rec., p. 404.)

The majority opinion, starting, as is submitted, from wrong premises, thereupon proceeds to discuss the evidence at great length, and to comment upon the various witnesses and the relative weight to be given their testimony, as if the Court were called on to determine whether the undue influence had been proved. (Rec., pp. 382, 384–395.) But the Court had nothing to do with the question of the weight of the evidence. It had no right to consider, still less to determine, the relative importance of the witnesses or the effect to be given to their testimony. A jury trial would become a nullity and a farce if the Court had the power, without setting aside the verdict, to pass upon the merits of the case.

Where issues are framed for a jury on a probate appeal, the verdict of the jury, if not set aside by the justice, is conclusive upon the issues of fact.

Crocker v. *Crocker*, 188 Mass. 16.

In a recent decision of the Supreme Court of Massachusetts the Court declined to sustain an exception to a request for

ruling that there was no evidence of undue influence where the record showed hardly more than a scintilla of proof.

Hoffman v. *Hoffman*, 192 Mass. 416.

In that case it was claimed that the will had been procured through the fraud or undue influence of the testator's wife. There was no evidence that the wife had any knowledge of the execution of the will or of its contents, or had ever said or done anything consciously to influence the testator in the disposition of his property, or that she had been other than a faithful and devoted wife to him, but the Court found that there was evidence "tending to show that he was unattractive in person and that she made inquiries or was informed about his property, and a jury would be warranted in finding that the marriage was a mercenary one on her part. If her motives were mercenary, the exercise of undue influence on her part would be more readily inferred than if they were not. There was testimony tending to show that after his marriage the relations between the testator and his children and their families, and old friends, and his previously declared intentions and views, underwent a great change," etc.

The record in the present case is full of testimony tending to prove not only the origin and growth of a strong influence on the part of Emma Danford over the testator and of her causing a total change in the relations of the testator to his wife, family, and friends, but a direct exercise of her control over him in the testamentary disposition of his property.

The propositions of law on which the plaintiffs in error rely are so elementary that it hardly seems necessary to cite authorities.

(a) This Court "has always guarded with jealousy" the

"constitutional right" to have "the effect of the evidence" determined by a jury.

Canal Co. v. *Knapp*, 9 Pet. 541.
Head v. *Hargraves*, 105 U. S. 45, 49.
Ins. Co. v. *Doster*, 106 U. S. 30.
Dunlop v. *R.R. Co.*, 130 U. S. 649.
G. T. Railway v. *Ives*, 144 U. S. 408, 417.
Baylis v. *Insurance Co.*, 113 U. S. 316.

The highest courts of all the States have agreed to this view of the law. Innumerable cases illustrate how the Courts have upheld the independence of juries and have resented any interference with or invasion of the proper province of the jury. The Court invades this province and commits reversible error if it instructs, expresses, suggests, or intimates any opinion as to the credibility of witnesses, the weight to be attached to their testimony in whole or in part, the inferences to be drawn from the facts in evidence, the relative importance of evidence, or the relative probative force of evidence.

People v. *Vereneseneckockockhoff*, 129 Cal. 497.
Com. v. *Barry*, 9 Allen 276.
Gilliam v. *Ball*, 49 Mo. 249.
Schemit v. *Brueggestradt*, 8 Mo. App. 46.
Blackington v. *Sumner*, 69 Me. 136.
Finch v. *Bergins*, 89 Ind. 360.
Canada v. *Curry*, 73 Ind. 246.

"Under our system of jurisprudence, the jury is called to pass upon the facts. It is not only their privilege, but their right to judge of the sufficiency of the evidence introduced to establish any one or more facts in the case on trial. The credibility of witnesses, the strength of their testimony, its tendency and the proper weight to be given it, are matters peculiarly within their province. The law has constituted

them the proper tribunal for the determination of such questions. To take from them this right is but usurping a power not given. The jury should be left entirely free to act according to their own judgment. Where there is a total defect of evidence as to any essential fact, or a spark, the least particle, a scintilla, as it is termed, the case should be withdrawn from the consideration of the jury. Where, however, the evidence introduced has a legal tendency to make out a proper case in all its parts, then, although it may, in the opinion of the trial court or the Appellate Court, be slight, inconclusive, and far from satisfactory, yet it should be submitted to the jury, whose proper province it is to consider and determine its tendency and weight."

Conely v. *McDonald*, 40 Mich. 150.
Mynning v. *Detroit, Lansing & Northern R.R.*, 64 Id. 93, 96.
Smith v. *Hutchinson*, 83 Mo. 683.

(*b*) The power to direct verdicts is one whose use is attended by hazard and danger. Such a power should never be exercised except in the clearest cases.

Patten v. *T. & P. R. R.*, 179 U. S. 658, 660.
Pythias Knights Supreme Lodge v. *Beck*, 181 Id. 49, 52.
Offcutt v. *The World's Columbian Exposition*, 175 Ill. 472.
O'Connor v. *Witherby*, 111 Cal. 523.

(*c*) Circumstantial evidence is ordinarily the only evidence by which undue influence can be established, and it is especially competent in cases of alleged undue influence.

Davenport v. *Johnson*, 182 Mass. 269.
Delafield v. *Parish*, 25 N. Y. 95.
Tyler v. *Gardiner*, 35 N. Y. 559.
Lewis v. *Mason*, 109 Mass. 171, 174.

In *Beyer* v. *LeFevre*, 186 U. S. 114, this Court said, referring to the facts of that case, that there was only a "flimsy showing" of undue influence and "no testimony justified the answer returned to the second question," (relating to undue influence), but there is nothing in that decision controlling the general rule as laid down,—that, if there is any evidence of undue influence, its weight is for the jury.

No absolute rule can be laid down as to what constitutes undue influence which can be applied in all cases. The effect of all acts must depend upon the relations of the parties to them and the character, strength, and condition of each party, and by the application of sound sense in each given case.

Rollwagen v. *Rollwagen*, 63 N. Y. 504.

It is not essential to prove affirmatively that the person charged with undue influence was present at the execution of the will or knew of its contents, or knew that the testator intended to make or had made a will. Undue influence which may produce a will contrary to the intention of the testator, if freed from that influence, may be exerted and ordinarily is exerted, in ways usually impossible to ascertain or to establish, and usually is found only as an inference from the facts relating to the relations existing between the person charged with the undue influence and the testator.

(*d*) It is unnecessary to establish that the testator was of unsound mind. Indeed, undue influence is usually found in cases where mental soundness is proved.

The language of the Court in two of the cases above cited is specially applicable to the facts in the case at bar.

"There is an almost wearisome monotony in the conformity of the facts developed on the hearing with the familiar and recognized *indicia* of contrivance and undue influence."

Tyler v. *Gardiner*, 35 N. Y. 559, 573.

"It matters not that she did not take for herself and relatives a larger share of his estate. She took enough to show her grasping disposition and overpowering influence."

Rollwagen v. *Rollwagen*, 63 N. Y. 504, 521.

ROBERT M. MORSE,
WILLIAM M. RICHARDSON,
For Plaintiffs in Error.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 68.

WILLIAM NOTLEY, CHARLES NOTLEY, AND MARIA HUGHES, PLAINTIFFS IN ERROR,

vs.

CECIL BROWN AND ANTHONY LIDGATE, PROPONENTS OF THE WILL OF CHARLES NOTLEY, DECEASED, ET AL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT.

Charles Notley, Sr., of Hawaii, died in May, 1902, testate. Petition for probate of his will and annexed codicils was presented by Cecil Brown, as his executor (R., 1-6), and was met by contest of his widow, Mele K. Notley, and children, Charles Notley, Jr., David F. Notley, Maria Hughes, and William Notley, alleging such will and codicils to be void because of "undue influence exercised by one Emma Danford, residing in the Territory of Hawaii, a beneficiary and legatee" therein, over the testator at the time of the exe-

cution of the will and codicils (R., 6-7). After hearing, the probate court admitted the will and codicils to probate (R., 8-10). Appeal from such order was taken to the circuit court of the fourth circuit, where issues were framed and testimony was presented on behalf of contestants in support of the single ground of protest, viz., "undue influence." At the conclusion thereof the trial court granted a motion to instruct the jury to return a verdict in favor of the proponents of the will and entered corresponding judgment (R., 362-363; R., 70-71). On appeal that judgment was affirmed by the supreme court of the Territory on March 8, 1904 (Opinion, R., 379-398). Motion for rehearing was denied June 3, 1904 (R., 411-414), and a second motion for rehearing was denied August 2, 1904 (R., 416).

I.

Jurisdiction.

When judgment of affirmance was rendered and the two motions for rehearing fully considered and denied, the jurisdiction of this court thereover was lacking, the question involved being wholly local—will or no will—and not reviewable here.

Ex parte Wilder Steamboat Co., 183 U. S., 545, 551.
Equitable Life Assurance Society v. Brown, 187 U. S., 308, 309.

The pending writ of error was allowed on May 28, 1906 (R., 428, 429), the jurisdiction to review being necessarily based wholly upon the authority of the act of Congress approved March 3, 1905 (33 Stats., ch. 1465, p. 1035), which amended the former act by providing such review "in all cases where the amount involved, exclusive of costs, "exceeds the sum or value of $5,000." Upon the ground that the act of March 3, 1905, took effect from its date, and could not be held retroactive to authorize review of

final judgments rendered before its passage, motion was made at the last term to dismiss the writ, but consideration thereof was postponed until the case should be reached upon the merits. In the brief supporting such motion full discussion was indulged to demonstrate that the act of March 3, 1905, could not be extended to the review of a judgment thus rendered long before its passage. Our contention was, however, fully sustained by the court's later decision, rendered April 22, 1907, in *Harrison v. Magoon,* 205 U. S., 501, wherein the writ of error was dismissed, the conclusion therein being most accurately stated by the syllabi, thus:

> "Where no right of appeal existed when the final "judgment was entered in the supreme court of a "Territory, an appeal or writ of error will not lie "under the act of March 3, 1905 (33 Stat., 1035), "granting appeals in certain cases, because after "final judgment a petition for rehearing was enter- "tained and not finally denied until after the pas- "sage of the act.
>
> "Writ of error to review (16 Hawaii, 332) dis- "missed."

This, we submit, concludes the question here, although it may well be noted that not only had the final judgment of affirmance been entered in the case at bar by the supreme court below, but two distinct petitions for rehearing had been heard and denied, the last on August 2, 1904 (R., 416), and the case therefore finally concluded, in every possible view, in that court before the passage of the act of March 3, 1905.

Conceding the necessary force of this conclusion, attempt is now made to establish the jurisdiction here, upon the ground that the action of the supreme court of Hawaii, on April 13, 1906, in quashing a writ of error sued out to that court from the circuit court is effective to now open the entire record here and bring the case within the full review authorized by the act of March 3, 1905.

In the well-considered decision of the court below quashing the writ of error (R., 420-423) it is plainly shown that under the practice and law of the Territory such review would not lie, inasmuch as the questions sought to be thus reviewed under the writ of error were fully heard and fully decided in that court upon the original appeal. The petition for the writ of error, the writ, and the assignment of errors thereon have been stipulated into the record here in order that this court may be most fully advised. Examination thereof will abundantly confirm the correctness of the court's action in quashing the writ.

It should be first sharply noted that the petition for writ of error in this court (R., 430-431) in express words treats as final the judgment of affirmance, rendered by the supreme court of the Territory on March 8, 1904, and expressly recites—

> "that on the 8th day of March, 1904, the supreme
> "court of the Territory of Hawaii entered a final
> "judgment in the above-entitled cause in favor of
> "the present defendants in error and against these
> "plaintiffs in error, and one David F. Notley, said
> "cause being entitled in said court," etc.

It then recites the two petitions for rehearing which were presented and severally denied on June 3, 1904, and August 2, 1904. The writ, in terms, was prayed to review this "final judgment" of March 8, 1904, and the accompanying assignments of error (R., 431-433), in express terms, treat the stated judgment of March 8, 1904, as a final judgment, assigning as additional error the action of the court in quashing the subsequent writ of error.

It is hence plain that the writ of error from this court was prayed for, and advisedly taken by the plaintiffs in error, to review this final judgment of March 8, 1904, because, whilst the quashing of the writ of error is so assigned for error, the voluntary prayer with which the assignment of error concludes is that the judgment of the supreme court

"in said cause be reversed, and that the said supreme court "of the Territory of Hawaii be ordered to enter an order "sustaining the exceptions of the present plaintiffs in error, "and remanding the said cause to the circuit court of the "fourth circuit for further proceedings."

That the decision and judgment rendered by the supreme court of Hawaii on the original appeal settled all the questions involving the merits of the controversy abundantly appears from this record, and fully justifies the action of that court in quashing the writ of error, which sought to bring again into review the same identical questions.

The extreme and technical ground on which the jurisdiction is sought to be here sustained will be understood by brief recital from the record.

When the will of the testator, Notley, was presented for probate, contest was filed thereto by these plaintiffs in error, and by the widow, Mele K. Notley (who has since elected to take her full dower rights, and has hence disappeared from the case), and David F. Notley, who, after the decision upon the appeal in the supreme court below, refused, upon summons in severance, to join in the present writ of error (R., 417).

The caveat or contest submitted to the probate court was based wholly upon the two objections, (1) that the will and codicils offered for probate were not the last will and testament of the testator, and (2) that same were executed "by, "through, and by virtue of the undue influence exercised by "one Emma Danford, residing in the Territory of Hawaii, "a beneficiary and legatee mentioned in said alleged will "and codicils thereto, over the said Charles Notley, deceased, "at the time of the subscribing, signing, sealing, publishing, "and declaring by the said Charles Notley, deceased, of his "alleged will and testament and codicils thereto as aforesaid, "and that said alleged will and codicils thereto are void by "reason of undue influence, these contestants alleging that "they are the heirs-at-law and all of the heirs-at-law of the

" said Charles Notley, deceased, and are entitled to inherit his " entire estate if said alleged will and codicils thereto are " refused probate" (R., 6-7).

Order of probate was entered, and in the exercise of statutory right the contestants appealed therefrom "to the circuit "court of the fourth judicial circuit, Territory of Hawaii, in " term time, before a jury" (R., 10-11).

In the "Motion for trial of issues of fact by the jury," filed pursuant to this appeal (R., 53), it was stated—

> "That contestants desire and hereby move that the " following issues of fact be tried in this court by " a jury:
>
> "1st. Are the documents dated respectively May " 18, A. D. 1899, August 2nd, A. D. 1900, and April " 11th, A. D. 1902, propounded before the Honorable " Gilbert F. Little, aforesaid sitting in probate at " chambers as the last will and testament of Charles " Notley, deceased, and codicils thereto (and ad- " mitted to probate as such by said judge by order " dated the 19th day of September, A. D. 1902) the " last will and testament of the said Charles Notley " deceased & codicils thereto?
>
> "2nd. Were said alleged will and codicils thereto " executed and published by the said decedent Charles " Notley as and for his last will and testament and " codicils thereto by, under and by virtue of undue " influence exercised by one Emma Danford, residing " in the Territory of Hawaii, (a beneficiary and " devisee mentioned in said alleged will and codicils " thereto) over the said Charles Notley, deceased, at " the time of the executing and publishing by the " said Charles Notley, deceased, of said alleged will " and codicils thereto?
>
> "In support of this motion contestants further al- " lege that they have contested before the said circuit " judge at chambers the probating of the said alleged " will and codicils thereto.
>
> "This motion is based upon the records herein and " all papers and documents filed in this cause and " the affidavit of David F. Notley filed herewith."

It thus clearly appears (1) that by the appeal the circuit court took jurisdiction of the entire case; (2) that the grounds of contest were only the two above stated, and (3) were both thus definitely submitted for determination.

Under the instructions of the court (R., 364) verdict was rendered fully and directly responsive to the two questions of fact thus forming the only matter in contest between the parties. Motion for new trial was made and overruled (R., 365), and counsel thereupon asked allowance of forty days "from this date in which to file and perfect my appeal to " the supreme court and bill of exceptions."

In the bill of exceptions (R., 82) it is recited that after the refusal of the motion for new trial—

> "Thereupon counsel for contestants asked that the " court allow contestants forty days from the 28th " day of January, 1903, in which to file and perfect " appeal to the supreme court and bill of exceptions. " No one objecting the court so ordered."

On the entering of the verdict order was duly signed by the court for entry of judgment (R., 69), and the judgment appears (R., 70) bearing the following endorsement:

> "In the fourth circuit court, Territory of Hawaii. " In the matter of the will of Charles Notley, De- " ceased. Judgment. Filed January 29th, 1903. " (S'g'd) Daniel Porter, clerk. Filed June 8th, " 1905. (S'g'd) A. S. Le Baron Gurney, clerk."

As matter of fact the judgment was thus endorsed by the clerk as filed January 29, 1903, but on return of the case from the supreme court, and it appearing that the formal judgment had not been entered and signed by the clerk *on the face thereof,* on motion of defendants in error, and out of abundant caution, the court, on June 8, 1905, directed the judgment to be so entered *nunc pro tunc* and as of the 28th day of January, 1903, when, as shown by the record and above quoted, it was in fact filed.

In the petition accompanying the writ of error to the supreme court below (Supp., R. 2-7) it will plainly appear that no new ground for review is set up thereunder involving the merits of the cause. But under paragraphs 11, 12, 13, and 14 these formal proceedings, in respect of the original judgment in the circuit court, are set forth.

Accompanying the petition and the writ to the supreme court below appear the assignments of error in support thereof, and which are specially required by the laws of Hawaii under section 1877, Revised Laws, 1905, which reads:

> "An assignment of error should be filed at the "time of procuring the writ."

In reviewing these assignments of error the supreme court below, in quashing the writ of error, correctly observed "that "there is no question but that the first five assignments of "error have been disposed of by this court" (R., 421).

And after citing its own decisions, and especially upon the point that error and exceptions are concurrent methods for the correcting of errors in the trial of law cases in the circuit courts, the court applied the rule that questions thus determined by final judgment upon one appeal or writ of error cannot be reopened for reargument and rehearing upon a second writ of error or appeal, and pertinently concludes its discussion (R., 423) thus:

> "It was suggested that the plaintiffs in error, after "the verdict of the jury had been rendered and ex-"ceptions thereto had been overruled by this court, "might have set up other grounds for resisting the "probate of the will, but no such other grounds are "set forth, and, in the absence of such a showing, "we cannot assume that there were any, even if they "could have been set up."

It is thus plain—

That while the law of Hawaii (R. L., 1905, sec. 1804)

provides that "judgment shall be entered by the clerk, with-
"out motion, immediately upon the rendition of verdict or
"of a judgment of the court * * *" all parties treated the judgment as thus formally entered, and the plaintiffs in error here took formal appeal therefrom accordingly. Indeed, as this record shows the endorsement of the judgment under the signature of the then clerk as filed January 29, 1903—immediately following the verdict—it should properly be treated as in fact and law entered upon that date. By the statute the duty of entering the judgment was put upon the clerk "without motion" required to that end. Plain justice, therefore, requires that these plaintiffs in error, having treated the judgment as thus entered, taken formal appeal therefrom to the supreme court, and there thrice argued the case upon such appeal, cannot now be heard to say that there was no judgment then properly entered, or to insist that the *nunc pro tunc* effect given to the formal entry thereof upon the record of the circuit court could be made reviewable error in this court, when the final judgment of the supreme court below, entered on March 8, 1904, and upon their broad appeal and exceptions, determined all questions affecting the merits which they had raised by their original contest, and thereby submitted to adjudication. It would, we submit, be trifling with justice to now hold in reversal of the supreme court below that these identical questions could, by new appellate proceedings, be brought again in review before the supreme court of Hawaii, and its action in quashing the writ then held to sufficiently support a petition in error to this court justifying review of the entire cause.

The court below, in quashing the writ, has done it upon the distinct ground that it would not lie to thus review questions theretofore heard and decided by it in the cause. The judgment of the circuit court, following the verdict in affirming the judgment of the probate court and admitting the will to probate, was in no sense interlocutory. Indeed,

the jurisdiction to review upon the original appeal would have been wholly lacking in the supreme court of Hawaii, except upon such final judgment, for the decisions of that court on this proposition are as full and strong as any which can be found in respect of a matter of both principle and practice which has uniform recognition and enforcement.

Thus in *Provnl. Govt. vs. Ah Un,* 9 Haw., 164, the court said:

> "We cannot find any authority in our statutes for "allowing appeals from interlocutory or provisional "rulings of a district court. It would be intolerable "to allow such a procedure. For then a party in any "case, civil or criminal, could take an appeal on one "ruling upon the first plea which might be made, "and the case would be tied up until it could be "heard by the supreme court. * * * 'An appeal "'only lies from a final judgment or some decree "'affecting substantial rights and equivalent thereto' "(1 A. & Eng. Ency. of Law, p. 617, and cases "cited). 'An appeal, like a writ of error, is gener-"'ally confined to a final judgment. It cannot be "'taken, unless expressly authorized by statute, from "'a judgment merely interlocutory or provisional' "(Hilliard, New Trials, p. 568, and case cited). It "has been the unquestioned practice for years not to "allow appeals of the character of the one now before "us, and we prefer to adhere to it."

And this doctrine has been reaffirmed by the same court in—

> *Queen vs. Poor,* 9 Haw., 218.
> *Brown vs. Carvalho,* 9 *ibid.,* 180.
> *Provnt. Govt. vs. Smith, ibid.,* 176.
> *Estate of Banning, ibid.,* 357, wherein it was said:

> "By the Court: By repeated decisions of this "court, decided in July, 1893, *Prov'l Govt. vs.* "*Smith; Prov'nl Govt. vs. Ah Un; Brown vs. Carvalho;*

> "*Prov'l Govt. vs. C. A. Herring* and *Prov'l Govt. vs.* "*H. F. Poor,* we have held that a final disposition of "the cause must be made before it is appealable. In "this case the order of Judge Cooper was not final. " * * * We do not consider the order to be final, "and *therefore* dismiss the appeal without prejudice "to the appellants."

In *Barthrop vs. Kona Coffee Company,* 10 Haw., 398, the same rule is applied in respect of a decision overruling a demurrer to a bill, which was held not final for the purposes of appeal, the court reviewing the question at some length and reaffirming, by express citation, its former decisions noted *supra.*

The opinion of the supreme court in quashing the writ cites some of the pertinent cases ruled in this court to like effect and which most clearly, in expression and legal effect, justify the language of the court below thereon (R., 422) that—

> "It is well settled that the second writ of error "brings up nothing for revision except the proceed- "ings subsequent to the mandate; and it follows that, "if those proceedings are merely such as the man- "date commanded and were necessary to the exe- "cution of the mandate, the writ will be dismissed, "as any other rule would enable the losing party "to delay the execution of the mandate indefinitely, "which cannot be permitted (*Cook vs. Burnley,* 11 "Wall., 677).
>
> "An appeal from a decree which the circuit court "passed in exact accordance with the mandate of "this court upon a previous appeal will upon motion "of the appellee be dismissed with costs (*Stewart vs.* "*Salaman,* 97 U. S., 361). See also *Humphrey vs.* "*Baker,* 103 U. S., 736; *Aspen Co. vs. Billings,* 150 "U. S., 31."

The court then cites *Hartshorne vs. Sleight,* 3 Johns (N. Y.), 554, where a second writ of error bringing up errors previously decided in the same case was quashed upon the

same ground, to which we add the strong and pertinent language found in *Pollock vs. Cohen,* 32 Ohio St., 514, 519:

> "It is well settled by authority and is a doctrine "sound in principle, that all questions which existed "in the record and could have been considered on "the first petition in error, must ever afterwards be "treated as settled by the first adjudication of the "reviewing court.
>
> "The time should come in the history of a cause, "when litigation must end. If the failing party "was allowed to prosecute a new petition in error on "the same record, whenever he imagined he had dis- "covered new ground of error not previously as- "signed litigation would be interminable. Such a "practice would violate well-settled principles of law "and be against public policy (*Evans vs. St. John,* "9 Porter, 186; *Zimmerman vs. Turney et al.,* 24 "Wis., 483; *Lollard vs. Lollard,* 5 B. Mon., 340; "*Hendley et al. vs. Challiss,* 15 Kans., 602; *Erring* "*vs. McNairy et al.,* 20 Ohio St., 315; *Perrie vs.* "*Kneeland et al.,* 9 Wis. 23)."

So in *Hill vs. Chicago & Evanston R. R. Co.,* 140 U. S., 52, 54, speaking to the same point, it was said:

> "We are of the opinion that the decree of June 8, "1885, was a final decree, within the meaning of "that term in the law respecting the appellate juris- "diction of this court, as to all matters determined "by it, and that they are closed against any further "consideration. It disposed of every matter of con- "tention between the parties, except as to the amount "of one item, and referred the case to a master to "ascertain that. It dismissed the bill against several "defendants for want of equity, and denied relief to "the complainant upon all matters in controversy "except as to that amount, and retained the case "only as against the parties interested in that matter. "The rights and liabilities of all the parties were "in other respects determined.
>
> "But there was no adjudication as to the payment "of the amount to be ascertained by the master; that "remained unsettled. It was, however, a severable

"matter from the other subjects of controversy and "did not affect their determination. The fact that "it was not disposed of did not change the finality "of the decree as to the defendants against whom the "bill was dismissed; that amount, or to whom made "payable, did not concern them. They were no "longer parties to the suit for any purpose. The ap- "peal from the subsequent decree did not reinstate "them. All the merits of the controversy pending "between them and the complainant were disposed "of, and could not be again reopened, except on ap- "peal from that decree. As to the other parties, it "remained to ascertain the amount of one item and "to determine as to its payment. The decree of July "14, 1887, covered that matter, and finally disposed "of it. The decree of June 8, 1885, was appealable "as to the matters which it fully determined; so also "was the decree of July 14, 1887, as to the severable "matter which it involved (*Todd vs. Daniel*, 16 Pet., "521; *Forgay vs. Conrad*, 6 How., 201; *Withenbury "vs. United States*, 5 Wall., 819; *Germain vs. Mason*, "12 Wall., 259; *Milner vs. Meek*, 95 U. S., 252). "But the time to appeal from the first decree elapsed; "and, no question being raised as to the second de- "cree, that of July 14, 1887, it must be *affirmed*, "*and it is so ordered.*"

It is hence plain that if any part of this cause be now reviewable here upon a writ of error directed *only* to the final judgment rendered upon the original appeal by the supreme court of Hawaii in March, 1904, and which clearly determined the *whole controversy*, such review must be limited to the inquiry whether the supreme court of Hawaii erred in quashing the writ of error. For if the questions so determined in the final judgment of that court, rendered in March, 1904, are not reviewable (a result too plain to require further discussion), then it remains only to consider whether that court erred in ruling upon the question of practice involved, namely, entry, of the judgment *nunc pro tunc* in the trial court.

It is beyond question that the errors assigned in that court

reviewable upon the writ of error involved only the question of technical practice or procedure, and, that court having so clearly ruled that what was done was in that regard correctly done pursuant to its prior decision and judgment which had determined all the controversy between the parties, and in proper execution thereof its decision ought not to be here disturbed.

Now, it is manifest that the supreme court of Hawaii had both power and jurisdiction to hear and determine the question whether its former judgment and mandate had been correctly administered below. That is a power inherent in all courts of appellate review. It is so given to the supreme court of Hawaii by express statute, and here we note manifest mistake indulged in the brief of opposing counsel, at page 5, when they state that by the Revised Laws of Hawaii, 1905, section 1883, it is provided that supreme court of the Territory—

> "shall have power to enter such judgment in the case
> "as in their opinion the facts and law warrant."

and adds thereto counsel's statement:

> "But this statute was not in force in 1904."

Reference to the Revised Laws of Hawaii will show, under this section, that it but quotes the laws of 1892, ch. 95, 514, and sec. 1456 of the Civil Laws.

And in *Orumon vs. Territory* (decided in May, 1901), 13 Haw., 412, 418, the court said:

> "The part of the sentence in excess of the authority
> "of the judge is easily separable from the other part
> "of the sentence, and if it were necessary this court
> "could order the illegal part stricken from the
> "sentence (sec. 1456, Civil Laws 1897; *Jackson vs.*
> "*United States*, 162 Fed. Rep., 477; *Garden vs. United*
> "*States*, 87 Fed. Rep., 172; *United States vs.*
> "*Pridgeon*, 153 U. S., 48; *The People vs. Bonilla*, 38
> "Cal., 698; *Territory vs. Poloaica*, 13 Haw., 335)."

And in the same case a former decision in 5 Haw., 598, was overruled, the court saying that it was *dictum*, and, if in conformity with the common law, "sufficient weight was "not given to the provisions of our statute on the subject, "which were at that time the same in substance as that now "in force and above quoted."

In *Rose vs. Smith*, 5 Haw., 377, the facts as stated in the decision were that after trial and judgment a new trial was granted, and "upon a second trial on the same issues the "verdict of the jury was in favor of Keoni Liaikulani, but "no judgment was entered upon that verdict. Exceptions "were taken, but were afterward withdrawn by counsel for "Kaawihi. It is claimed by defendant's counsel that there is "no judgment in favor of Keoni Liaikulani, etc., and that "Kaawihi is not estopped by the verdict."

But the court ruled:

> "We think that as the law makes it the clerk's duty "to enter up judgment on a verdict (unless certain "named proceedings are taken), the court must re- "gard such an entry as having been made, and may "order it to be made *nunc pro tunc*.
>
> "The plaintiff, as the grantee of Keoni Liaikulani, "must not be allowed to suffer by the act of the court, "and should be in no serious position by the failure "to enter the judgment then, for the judgment had "been duly entered."

In *Kukea vs. Keahi*, 10 Haw., 505, 506, the court held:

> "One who has obtained a verdict determining his "rights ought not to be deprived of the benefit of it "from a mere delay in entering judgment, especially "if such delay is not the result of his own laches, but "is occasioned by the acts of the opposing party in "interposing motions or of the court in taking time "for advisement (*Kelly vs. Riley*, 106 Mass., 339; "*Deal vs. Hiller*, 6 Oh. St., 228; *Hillker vs. Kelly*, "13 Ind., 336). There is a greater reason for so "holding under our practice where judgment is re- "quired to be entered by the clerk as a matter of

> "course immediately after verdict and no motion or "order therefor is required, and exceptions or a "motion for a new trial has the effect rather of stay- "ing execution than of postponing judgment (Civ. "Code, sec. 1155; *Rose vs. Smith*, 5 Haw., "377. * * *)."

Hence the court had and exercised unquestioned power since long before 1904, and by express statute, to thus correct manifest misprision or mistake, either upon its own records or upon the records of its subordinate tribunals, either directly or by affirmance thereof, in order that same should conform to its mandate and effectively enforce its judgments.

Indeed, as the judgment of the circuit court affirming the judgment of the probate court in admitting the will and codicils to probate is endorsed in the handwriting of the clerk "Judgment. Filed January 29th, 1903. (S'g'd) "Daniel Porter, clerk" (R., 71), it may well be urged that the judgment was in fact entered by the clerk on that date. His file-mark and signature thereon certainly gave it then full authenticity and made it matter of record.

In *Cline vs. Thurston*, 47 Cal., 21, 29, it was held:

> "Several objections were made by counsel for the "defendant to this evidence.
>
> "1. That the judgment was not signed either on "the roll or elsewhere by the judge or clerk of the "court. It is not required that a judgment should "be signed by the judge or clerk, and as the judg- "ment-roll was an original record of the court in "which it was offered, it required no exemplifica- "tion."

So in *Lamer vs. Richardson*, 72 Ala., 134, 136, which involved a will contest and jury trial on subsequent mandamus to compel the change of date from Saturday night (when the verdict was rendered) to the following Monday, in respect of the judgment, the court held:

> "When the jury returned their verdict in favor of "the will, the judgment of the court establishing it

"was a matter of course, unless the verdict was set "aside and a new trial granted (Code, sec. 2329). "In this the analogy between it and a suit at law is "perfect. When the verdict was rendered in this "case, sustaining the will, the contestants were as "fully informed what the judgment would be, as "they were when the minute entry was written up. "Of course, we intend this remark to apply only "when there is no ground for arresting the judg- "ment. The judgment entered is but the logical "conclusion resulting from the premises, ascertained "by the verdict. In practice, the judgment is rarely, "if ever, announced by the court. It follows so "necessarily and naturally that it is taken for "granted. Its first actual utterance is in the reading "of the minutes, the work of the clerk. The judg- "ment, no matter when written up, is considered "and treated as given on the day the verdict is "rendered. Such is the rule in trials at common "law; and we think the same rule must be observed "in this case."

Gregory vs. McVeigh, 23 Wall., 294, cited on the opposing brief, is in no sense applicable here. The same authority was cited in the supreme court below in opposing the motion to quash the writ, and the court in its opinion (R., 422), in reference thereto, states:

"Counsel for plaintiffs in error seem to think that, "unless this court entertains jurisdiction and affirms "the judgment of the lower court, the questions de- "cided by this court on the bill of exceptions cannot "be reviewed by the Supreme Court of the United "States."

And after quoting fully from *Gregory vs. McVeigh,* adds (R., 423):

"This court, except where the matter is controlled "by the decision of a higher court, must decide ques- "tions coming before it as if no revisionary tribunal "existed, and as if its judgment was to be final and

> "conclusive. It should neither accelerate nor retard
> "appeals from its decisions. See *Hartshorne vs.*
> "*Sleight, supra.*"

In *Gregory vs. McVeigh, supra,* as appears from the recital of the decision therein, the application for writ of error to each one of the judges of the court of appeals of Virginia was "rejected because the judgment was 'plainly right.'" Whereupon this court held such application to be equivalent to a rejection of the writ of error by the entire court, sitting as such, and entertained jurisdiction to review the cause on that ground. But in the present case the court below has quashed the writ of error upon the distinct ground that, contrary to the law and practice, the parties thereby sought to have reheard in that court, under such writ, the entire merits of the controversy which had been so heard and finally determined upon their original appeal. The distinction is obvious. In *Gregory vs. McVeigh* the court of appeals of Virginia refused to hear the case *at all,* whereas here the court below had fully heard and determined the whole case upon the original appeal and quashed the writ of error, which sought to bring up again the same controversy and the same questions.

In refusing so to do and in quashing the writ the court (R., 421, 422) pertinently said:

> "Errors and exceptions are concurrent methods for
> "the correcting of errors made in the trial of law
> "cases in the circuit courts, the conditions and limita-
> "tions of each method being different (*Cummings*
> "*vs. Iaukea,* 10 Haw., 4)."
>
> "In *Ferreira vs. H. R. T. & L. Co.,* 16 Haw., 406,
> "it was held—
>
> "that where a party has brought a bill of exceptions
> "to this court and has also sued out a writ of error
> "covering the same matters he will be obliged to
> "elect which procedure he will follow. The court
> "said on page 408: 'Though the remedies are con-
> "'current it does not follow that the party is entitled

> " 'to both of said remedies at the same time any more
> " 'that he would be entitled to maintain two actions
> " 'for the same cause in courts of concurrent juris-
> " 'diction.'
>
> "That being so, it would seem to follow that a party
> " after pursuing one remedy to termination, namely,
> " by exceptions, could not thereafter pursue the other
> " remedy, namely, writ of error, to determine exactly
> " the same questions. It would be like an appeal or
> " writ of error from this court to this court. If this
> " could be done there would be no end to litigation
> " and appeals, and the courts themselves might be
> " turned into instruments of injustice by an obstinate
> " litigant. This is the inference to be drawn from
> " the language of this court in *Cummings v. Iaukea,*
> " *supra,* where it is said that 'undoubtedly if the
> " 'ground of error in the cause had been made mat-
> " 'ter of exception and had been decided in the su-
> " 'preme court, error would not lie.'
>
> "This view is sound on principle and has the sup-
> " port of the United States Supreme Court, to say
> " nothing of the courts of the different States."

In thus ruling the supreme court below fully adopted in principle and in part the language of this court in *Stewart vs. Salamon,* 97 U. S., 361, wherein, speaking through Mr. Chief Justice Waite, it was said (p. 361-362):

> "An appeal will not be entertained by this court
> " from a decree entered in the circuit court or other
> " inferior court, in exact accordance with our man-
> " date upon a previous appeal. Such a decree, when
> " entered, is in effect our decree, and the appeal
> " would be from ourselves to ourselves. If such
> " an appeal is taken, however, we will, upon the
> " application of the appellee, examine the decree
> " entered, and if it conforms to the mandate, dismiss
> " the case with costs. If it does not, the case will be
> " remanded with appropriate directions for the cor-
> " rection of the error. The same rule applies to writs
> " of error. This is not intended to interfere with any
> " remedy the parties may have by mandamus.

"This is an appeal from a decree entered upon our " mandate. No complaint is made as to its form, and " it seems to be in all respects according to our di- " rections. The effort of the appellant was to open " the case below, and to obtain leave to file new plead- " ings, introducing new defenses. This he could not " do. The rights of the parties in the subject-matter " of the suit were finally determined upon the orig- " inal appeal, and all that remained for the circuit " court to do was to enter a decree in accordance with " our instructions, and carry it into effect. If in " the progress of the execution of the decree, after " its entry, either party is aggrieved, he may appeal " from the final decree in that behalf; but such an " appeal will bring up for re-examination only the " proceedings subsequent to the mandate.

"The appeal will be dismissed with costs; and it is " *so ordered.*"

Now, in applying this settled principle to the present case, the supreme court of Hawaii, in its decision quashing the writ of error, held (R., 421):

"The second ground for quashing the writ is that " all the errors assigned have been heretofore decided " by this court. There is no question but that the " first five assignments of error have been disposed of " by this court. The other assignments of error " have reference to the order of January 29, 1903, " and the proceedings subsequent to the overruling " of the exceptions, all of which are referred to above. " As already pointed out it is at least an open ques- " tion whether these subsequent proceedings were " necessary, but if they were the action of the trial " court in each instance was in exact compliance " with the opinion of this court on the overruling " of the exceptions. See 15 Haw., 435, 700; 16 " Haw., 66. This court said in *Meheula vs. Pioneer* " *Mill Company*, 17 Haw., 94, that 'if no judgment " 'was entered on the verdict it is entered by the cir- " 'cuit court upon notice of the overruling of the ex- " 'ceptions. This result follows as a matter of law.'"

Under these conditions of fact and law it is impossible to allege error here as justifying review of this cause, in whole or in part, for, we respectfully submit, the supreme court of Hawaii had manifest right to declare the meaning and effect of its own decision and judgment, and it abundantly appears from its decision quashing the writ of error that its action was in full accord with long-settled precedent and practice in that court.

Under such circumstances the attempt to urge review in this court is based upon an extreme technicality, which when brought to this final analysis disappears in the mists of obscurity.

II.

The Merits.

Charles Notley, Sr., died on May 2, 1902, at the age of 75 years (R., 276), leaving a last will, made and dated May 18, 1899, or nearly three years before his death, and two codicils thereto, made and dated respectively August 2, 1900, and April 11, 1902.

In the original will the executors named were T. R. Walker, formerly of Honolulu, and A. Lidgate, of Hamakua, Island of Hawaii, but, in consequence of Mr. Walker's departure from Territory, by the first codicil his appointment as executor was revoked by the testator, and Cecil Brown was substituted for him as executor.

The executors duly made petition to Hon. G. F. Little, judge of the circuit court of the fourth circuit, sitting at chambers, for probate of the said will and codicils, and a notice of contest of the will was filed by Maria Notley, widow of the deceased, Charles Notley, David Notley and William Notley, sons, and Maria Hughes, daughter.

After several hearings had, on the 10th day of July, 1902, and the 19th day of September, 1902, at which evidence was introduced by the defendants in error (hereinafter referred

to as proponents) and plaintiffs in error (hereinafter referred to as contestants) respectively, the said judge, on September 19, 1902, made an order and decree admitting the said will and codicils to probate.

From such order and decree an appeal was taken by the contestants to the circuit court of the fourth circuit in term time before a jury, and the issues of fact, framed by the contestants, were as follows:

(1) Are the documents dated May 18, 1899, August 2, 1900, and April 11, 1902 * * * the last will and testament of Charles Notley, deceased?

(2) Were such alleged will and codicils executed and published by the said Charles Notley * * * under and by virtue of undue influence exercised by Emma Danford at the time of the execution and publishing thereof?

A jury was empanneled on January 23, 1903, by the Hon. W. J. Robinson, third judge of the circuit court of the first circuit, and the trial proceeded until the 28th day of January, 1903, when, in pursuance of the directions of the said judge, the jury returned a verdict in favor of the proponents of the said will and codicils.

At the trial the proponents introduced evidence showing that in the execution of the said instruments all the formalities required by law were complied with; that the testator was at the times of the execution of the said instruments mentally competent and of sufficient capacity to execute them, and that on each occasion he understood fully what he was doing and the nature of the business he had in hand.

This evidence so introduced by the proponents was undisputed, and after its introduction the proponents rested their case, the burden being upon the contestants to establish their charge that the said alleged will and codicils were executed by the testator under and by virtue of undue influence exercised by Mrs. Emma Danford at the time of the execution and publication by the testator of the said instruments.

The contestants introduced in evidence certain testimony

claimed by them to support the charge of undue influence, but upon the close of their case the court, on the proponents' motion, found that there was no evidence that there was any undue influence used by Mrs. Danford, or any other person, upon or over the testator, either before or at the time of the execution of the said instruments, that the will and codicils were the spontaneous, free, and voluntary act of the testator, and directed the jury to return a verdict in accordance with his opinion.

The contestants thereupon brought the case by a "bill of exceptions" to the supreme court of the Territory, which, on the 8th day of March, 1904, sustained the action of the trial court and overruled the exceptions. Two motions for rehearing subsequently filed by the contestants were denied by the supreme court on June 3, 1904, and August 2, 1904, respectively. The decision on the second motion was unanimous and was rendered, after hearing full argument on the merits, by a bench of which only one member—Frear, C. J.—had participated in the prior hearings.

A.

What Constitutes Undue Influence.

For the determination of the question of the correctness of the action of the trial judge, in directing a verdict for the proponents of the will on the ground that there was no evidence of undue influence that could be considered by the jury, and of the action of the supreme court in sustaining the trial court and overruling the exceptions, we consider that it will be necessary, first, to ascertain what constitutes "undue influence" sufficient to invalidate a will, and refer the court to the following cases:

Conley vs. Naylor, 118 U. S., 127 (p. 134):

> "The ground upon which courts of equity grant relief in such cases is that one party by improper

means and practices has gained an unconscionable advantage over another. The undue influence for which a will or deed will be annulled must be such as that the party making it has *no free will,* but stands *in vinculis.* It must amount to force or coercion, destroying free agency. Now (quoting *Eckert vs. Flowry,* 43 Penn. St., 46) that is undue influence which amounts to constraint, which substitutes the will of another for that of the testator. It may be either through *threats or fraud,* but, however exercised, it must, in order to avoid a will, *destroy the free agency* of the testator at the time when the instrument is made. A testator (citing *Davis vs. Calvert,* 5 Gill. & J., 269, 302) shall enjoy full liberty and freedom in the making of his will and possess the power to withstand all contradiction and control. That degree, therefore, of importunity or undue influence which deprives a testator of his free agency, which is such as he is too weak to resist and will render the instrument not his free and unconstrained act is sufficient to invalidate it."

Ralston vs. Turpin, 129 U. S., 663.
Prest., &c., vs. Bowdoin College, 75 Fed., 480;
Mackall vs. Mackall, 135 U. S., 167,

in which case it is held (page 172):

"Undue influence must destroy free agency. It is well settled that, in order to avoid a will on the ground of undue influence, it must appear that the testator's free agency was destroyed, and that his will was overborne by excessive importunity, imposition, or fraud, so that the will does not, in fact, express his wishes as to the disposition of his property, but those of the person exercising the influence."

Towson vs. Moore, 173 U. S., 127 (p. 134);
Beyre vs. Le Ferre, 186 U. S., 124,

in which case the court, speaking by Mr. Justice Brewer, says:

"It will be remembered that it is not influence, but undue influence that is necessary to overthrow a will. Placing undue influence, *along with fraud and circumvention,* interprets the character of the influence"

That such is not merely the rule of the federal courts, see the following cases to the same effect:

Herster vs. Herster, 116 Penn. St., 612:

"Undue influence of that kind which will affect the last will of a testator must be such as subjugates the mind of the testator to the will of the person operating upon it, and in order to establish this proof must be made of some fraud practiced, some threats or misrepresentation made, some undue flattery, or some physical or moral coercion employed, so as to destroy the free agency of the testator, *and these influences must be proved to have operated as a present constraint at the very time of making the will.*"

Herster vs. Herster, 122 Pa. St., 239;
Dale Appeal, 57 Conn., 127:

"Her free agency and independence must be overcome, and she must by some *domination and control* exercised over her mind have been constrained to do what was against her will, and what she was unable to refuse and too weak to resist" (pp. 133 and 134).

Robb vs. Graham, 43 Ind., 1;
In re Langford, 108 Cal., 609:

"In order to set aside a will for undue influence there must be *substantial* proof of a pressure which overpowered the will of the testator at the time the will was made."

In re Kaufman, 117 Cal., 288 (p. 295);
Marx vs. Glynn, 88 N. Y., 357 (p. 371):

"There is another kind of influence more common than that referred to (physical coercion, threats of personal harm and duress), and that is where the mind and the will of the testator has been overpowered and subjected to the will of another, so that while the testator willingly and intelligently executed a will, yet it was really the will of another, induced by the *overpowering influence exercised upon a weak or impaired mind.* Such a will may be procured by

working upon the fears or hopes of a weak-minded person by artful and cunning contrivances; by constant pressure, persuasion and effort, so that the mind of the testator is not left free to act intelligently and understandingly. It is not sufficient for the purpose of proving undue influence to show that a will is the result of affection or gratitude, or the persuasion which a friend or relative may legitimately use; the influence must be such as to overpower the will of the testator, thus producing a disposition of property which the testator would not have made if left free to act. This kind of influence will not generally be presumed, but must be proved like every other fact by him who alleges it" (p. 371).

Brick vs. Brick, 66 N. Y., 144 (p. 149):

"To avoid a will on this ground it must be made to appear that it was obtained by means of influence amounting to moral coercion, destroying free agency, or by importunity which could not be resisted, so that the testator was constrained to do that which was against his actual will but which he was unable to refuse or too weak to resist" (p. 149).

Mitchell vs. Mitchell, 43 Min., 73;
Crowson vs. Crowson, 172 Mo., 691;
McFaden vs. Catron, 120 Mo., 252 (p. 275);
142 Mo., 634 (p. 646):

"There must be proof that the act was obtained by *coercion;* by *importunity* that could not be resisted; that it was done merely for the sake of peace, so that the *motive was tantamount to force or fear*" (p. 646).

Perkins vs. Perkins, 116 Ia., 253, 262;
Boggs vs. Boggs, 87 N. W., 39; 62 Neb., 274:

"The acts (citing *Boyse vs. Rossborough*, 6 H. L. Cas., 6—the leading English case) constituting undue influence must range themselves under one or other of these heads—*coercion or fraud.* In other words, in the absence of fraud and imposition, undue

influence, in order to invalidate a will, must amount, at least, to a *moral coercion.*"

Small vs. Small, 4 Greenleaf (Me.), 192;
Maynard vs. Vinton, 59 Mich., 153.

"Every influence which is brought to bear by a "legatee upon the mind of the testator, by means of "which the former secures a benefit, is not neces- "sarily undue. The employment of argument or "persuasion, directed to the understanding; of flat- "tery, addressed to the feeling of self-esteem, or of "appeals to the affection or pity of the testator, *will "not constitute undue influence* sufficient to vitiate "a will which, upon the whole, appears to be the out- "come of the free agency of the testator. Honest "intercession and solicitation, though insistent and "continuous during the period covering the execu- "tion of the will, if they do not result in *coercing* the "testator into making a will which he would not "have made voluntarily, are not undue influence. "It is only when such pressure results in *subverting "the will of the testator* to that of another that it is "undue influence. Neither advice nor argument nor "persuasion will vitiate a will made freely and from "conviction, though the will might not have been "made but for such advice and persuasion. Grati- "tude and affection growing out of benefits conferred "or being conferred; esteem of friendship, the result "of admiration for another's character, are allowed to "have their proper operation upon the mind and "volition of the testator. He has a right to keep his "mind and heart open to the sweet influences of "social ties and to the promptings of the natural "love which he may have for those of his own blood. "On the other hand, he has a right to listen to the "suggestions and solicitations of persons not of his "kindred which have for their object the procure- "ment of testamentary benefits at his hands. He "may lawfully permit himself to be influenced by "motives of friendship; he has a right to remember "the claims of those from whose hands he has re- "ceived favors during his lifetime; he may permit

"himself to be influenced by all those motives, or by "requests based upon his gratitude for past benefits "or present comforts enjoyed by him. His will "should be sustained if, after listening to and de- "liberating upon the appeals and solicitations, *his* "*mind is free from restraint and coercion;* and he is "at liberty to act freely upon them, to acquiesce in "or to reject them, and his will, when it is executed, "speaks his own mind and intention, voluntarily "formed, and not those of another person or persons."

1 Underhill, Wills, sec. 144.

Undue influence must be distinguished likewise from what is commonly spoken of as bad influence.

"In a popular sense," it is said in *Boyse vs. Rossborough, supra,* "we often speak of a person exer- "cising undue influence over another when the in- "fluence certainly is not of a nature which would "invalidate a will. A young man is often led into "dissipation by following the example of a com- "panion of riper years, to whom he looks up, and "who leads him to consider habits of dissipation as "venial, and perhaps even creditable; the companion "is then correctly said to exercise an undue influ- "ence. But if in these circumstances the young "man, influenced by his regard for the person who "had thus led him astray, were to make a will and "leave to him everything he possessed, such a will "certainly could not be impeached on the ground of "undue influence. Nor would the case be altered "merely because the companion had urged, or even "importuned the young man to so dispose of his "property; provided only that in making such a will "the young man was really carrying into effect his "own intention formed without either *coercion or* "*fraud.*"

In re Gilham's Will, 52 Atl. (N. J.), 690:

"Even if it should be inferred that these bene- ficiaries presented claims to the deceased * * * the case of appellant is not made out. To avoid a testamentary disposition on this ground it must be

made to appear that the will of deceased was dominated by those exerting influence, so that she was incapable of resisting and was compelled to do what she otherwise would not have done."

Schmidt vs. Schmidt, 201 Ill., 191 (pp. 200, 201).

Elkington vs. Brick, 1 L. R. A., 161 (p. 166) (N. J., 1888).

Rutherford vs. Morris, 77 Ill., 397 (pp. 412, 413, 415, 424).

Pomeroy's Eq. Jur. (2d ed.), § 951.

1 Underhill's Law of Wills, § 125.

Brown vs. Mollison, 3 Whart., 129 (p. 138).

We submit that the cases cited above fairly and clearly state what is the universally accepted and settled law as to what constitutes undue influence sufficient to invalidate a will.

The doctrines expressed therein may be summarized as follows: The exercise of mere influence on a testator, even if it should be successful in leading him to make a will which he would not otherwise make, would not necessarily justify setting the will aside. Ordinarily a person has a right to dispose of his property by will. If he complies with the statutory requirements, what purports to be his will cannot be set aside unless it is shown not to be his will. This may be made to appear either by showing that the person had not sufficient mind to make a will at all or by showing that his volition was overcome to such an extent that what purports to be his will was not his will but another's. There must be fraud or coercion. The testator must have been deceived or forced into doing what he would not otherwise have done.

The question that arises then in this case is: Is there any evidence that Mr. Notley had at the time of executing his will and codicils thereto no free will; that his free agency was overcome; that he stood *in vinculis*—his mind a bond servant to the superior mentality of Mrs. Danford; that his mind was dominated and controlled by and under subju-

gation to Mrs. Danford; that she was guilty of using either fraud, imposition, misrepresentation, circumvention, threats, undue flattery, or moral coercion to obtain a will peculiarly acceptable to her; that she used constant effort, persuasion, or importunity that Mr. Notley could not withstand or was too weak to resist; that he was not left free to act intelligently and understandingly; that, in fine, he was constrained and coerced by Mrs. Danford to dispose of his property in a manner that was against his wishes and which he would not have done if he had been left free to act intelligently and understandingly?

We contend that, however minute the search, however closely the record may be scrutinized, on such evidence will be found, and that the answer to the question by this court must be in the negative, as it has repeatedly been answered by the courts of Hawaii.

B.

Mode and Degree of Proof Required.

Counsel for contestants admit that "this is a case of circumstantial evidence," and it may be said in this case, as in *In re Langford*, 108 Cal., 608 (p. 613):

> "There can be no pretense that there is evidence of any direct influence exercised by (Mrs. Danford) or any other person over the decedent at the time of the execution of the will (or codicils), and affecting the testamentary act or constituting part of the *res gestæ*."

But the contestants contend that direct proof of undue influence is not necessary, but that it may be established by inference from other facts proved. This we concede, provided:

(1) That "the facts and circumstances proved are such as lead justly and reasonably to such an inference and that such

inferences are not drawn unfairly or unreasonably;" that "facts are proved from which the existence of undue influence results as an *unavoidable* inference;" that the inference sought to be deduced is a *"legitimate* inference from other facts and circumstances in the case." Undue influence cannot be established by inferences of any other nature; mere suspicion and conjecture are not enough.

See *2 Underhill's Law of Wills,* p. 188, § 132.

> "Direct proof of fraud or undue influence is always desirable but not indispensable. Either or both, where they are commingled, may be inferred from circumstances, though the circumstances must *necessarily and logically* lead to the inference that fraud or coercion was employed, and that the will does not represent the real intentions of the testator." * * * "Whether the evidence be direct or circumstantial it must be of a reasonably satisfactory and convincing character."

Furniture Co. vs. Bd. of Education, 58 N. J. Law., 646, is authority for the proposition (p. 648) "that upon no *reasonable* inference deduced from the facts before the trial court could a verdict have been rendered in favor of the plaintiff."

Dale's Appeal, 57 Conn., 127.

> "Such an undue influence may be inferred * * * but the facts and circumstances must be such as lead justly and reasonably to such an inference, and such an inference is not to be drawn unfairly or unreasonably" (p. 134).
>
> *Tyler vs. Gardner,* 35 N. Y., 559.

> "It (undue influence) must be established by affirmative evidence. It is thus established, however, when facts are proved from which it results as an *unavoidable* inference."
>
> *Reynolds vs. Root,* 62 Barb., 254.

"It is conceded that direct evidence of undue influence is not necessary; it may be and most frequently is a *legitimate* inference from other facts and circumstances in the case."

Brick vs. Brick, 66 N. Y., 144 (p. 149).

"It is not indispensable that there should be direct proof of the existence of undue influence, but the circumstances must be such as to lead justly to the inference that undue influence was employed and that the will did not express the real intention of the testator."

Schuchardt vs. Schuchardt, 49 A. (N. J.), 485, p. 486.

"When the testamentary capacity is undoubted the burden (of proving undue influence) will not be supported by mere evidence that some person had an *opportunity* to exert, or was possessed of undue influence over the testator. It must be made to appear, either expressly or by justifiable and fair inference from circumstances proved, that such influence was in fact exerted, and that it was so exerted as to *dominate* and *control* the will of the testator, and *coerce* him to make a testamentary disposition of his property which he would not otherwise have made."

And provided further:

(2) That the facts proved are not only consistent with the hypothesis of the will having been obtained by undue influence, but that they are inconsistent with a contrary hypothesis.

Boyse vs. Rossborough, 6 H. L. Cases, 6 (p. *50).

"It is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrar hypothesis."

Maynard vs. Winton, 59 Mich., 153.

"Influence must be such as to amount to *force* and *coercion, destroying free agency*, and there must

be proof that the will was obtained by this coercion; and the circumstances must be inconsistent with any hypothesis but undue influence."

In re McDevitt, 95 Cal., 17.

"Evidence must be produced that *pressure was brought to bear directly upon the testamentary act.* Circumstantial evidence is sufficient. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the testator."

Approved in *In re Langford*, 108 Cal., 609 (p. 622).

"I think there is nothing beyond suspicion shown here. There is no proof. Circumstances have been proven which accord with the theory of undue influence, none of which are inconsistent with the hypothesis that the will was the free act of an intelligent testator. This does not amount to proof."

Smith vs. Bank, 99 Mass., 605 (p. 612).

"There being several inferences deducible from the facts which appear, and equally consistent with all those facts the plaintiff has not maintained the proposition upon which alone he could be entitled to recover. When the evidence tends equally to sustain either of two inconsistent propositions neither of them can be said to have been established by legitimate proof."

Boggs vs. Boggs, 87 N. Y., 39 (p. 43).

"It is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis; and this statement of the rule has been universally accepted. The contestants' case falls short of this."

Schuchardt vs. Schuchardt, 49 A. (N. J.), 485 (p. 487).

"It is not sufficient to present facts from which the existence of undue influence may possibly be inferred. *The existence of interest* and *the opportunity to exert* it *will not suffice* to establish undue influence.

"If from the facts and circumstances existing when the will was made an influence can be drawn that its provisions are such as he intended them to be, and such as he would have made if no influence had been exerted upon him, the latter inference is at least as probable as the former, and the burden of proof in the attack upon the will is not sustained. The inference that undue influence prevailed over testator's intent, and induced him to do what he would not otherwise have done must stand upon preponderating proof, excluding other reasonable inference" (p. 488).

"If the character of testator and the circumstances existing at the execution of the will naturally and reasonably explain its provisions, so that it may be fairly inferred that it was such a will as he would have made, the inference that it was the product of influence will not be justified. It is not necessary to determine whether testator's indignation as to the conduct of his wife and children was justified, or whether he ought to have overlooked it and forgiven them. If the proofs show that the indignation existed, and for a cause that might occasion it, and the disposition made by the will would be the natural result thereof, the attribution of such disposition to undue influence cannot be supported."

Motive and opportunity alone are not sufficient.

Est. of Donovan, 140 Cal., 390;

Hughes vs. Rader, 183 Mo., 630 (708).

Somers vs. McCready, 96 Md., 438.

C.

The Evidence.

(a) Character, Mentality, and Physical Condition of Mr. Notley.

We deem it well to consider first the character and physical and mental health of the testator.

Dr. Herbert, one of the leading physicians in the Territory, who had known the testator intimately for 18 years, testifies that "he was not a man who would be subject to a controlling influence" (p. 13); "he was peculiarly strong in his character;" "he was firm; he was a man who would impress you as not easily influenced by any one; he was a strong character—not a weak man; he was a strong man, not weak mentally or physically—like a stream that runs deep, a deep man" (R., 18-19), and that "his mental condition during the six months preceding his death was exactly as it was during his previous life, clear and intelligent" (R., 20). During his last illness he was confined to his bed a week or ten days at the most (R., 17).

Mr. Cecil Brown's evidence is that "he was as honest a man as ever walked the earth," and "a warm-hearted, kind-hearted man" (R., 65); that he was sound mentally, and that the witness, at no time he had business or conversations with him, ever saw any indication of a failing intellect (R., 28). Mr. Brown was, and for a number of years prior to the execution of the will had been, the testator's regular legal adviser.

See also the evidence of Mr. Lidgate (R., 33), who was intimately acquainted with him for over fifteen years, that ever since he knew Mr. Notley he was perfectly competent to execute any instrument.

Also that of Lily Notley (R., 341): "He was a well, strong man even in his old age."

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Nothing to contradict or in any way modify this testimony as to the strength of Mr. Notley's character and mentality was introduced by the contestants, unless the statement of C. F. Chillingsworth (R., 112-113), "I think he enjoyed ladies' society," and who, when asked the question whether he, Mr. Notley, preferred to say "Yes" rather than "No" to the ladies, replied, "I could not well answer that question;" also "Some men are crusty—do not want ladies about the house. In his case he was especially affable, courteous, and attentive," can be considered as contradicting or modifying it.

This undisputed evidence as to the character and mentality of Mr. Notley is of the utmost importance in the case. Given a strong character, mentally and physically, it is hard to imagine it subjugated, dominated, coerced, or controlled into doing what is contrary to its own will.

This fact is recognized by Redfield in his Law of Wills, § 18, p. 518, where he says:

> "These questions will not be likely to arise, except in regard to persons naturally of weak minds, or facile dispositions, or where such has become their condition either from age or disease."

See also

Shailer vs. Bumstead, 99 Mass., 112.

> "To establish the charge of fraud and undue influence two points must be sustained: First, the fact of the *deception* practiced, or the *influence* exercised; and next, that this fraud and influence were effectual in producing the alleged result, *misleading* or *overcoming* the party in this particular act. The evidence under the first branch embraces all those exterior acts and declarations of others used and contrived to *defraud or control* the testator; and under the last includes all that may tend to show that the testator was of that peculiar mental structure, was possessed of those intrinsic or accidental qualities, was subject to such passion or prejudice, of such perverse

or feeble will or so mentally infirm in any respect, as to render it probable that the efforts used were successful in producing in the will the combined result. The purpose of the evidence in this direction is to establish that liability of the testator to be easily affected by fraud or undue influence, which constitute the necessary counterpart and complement of the other facts to be proved. *Without such proof the issue can seldom, if ever, be maintained.* It is said to be doubtful whether the existence and exercise of undue influence does not necessarily presuppose weakness of mind, and whether the acts of one who was in all respects sound can be set aside on that ground in the absence of fraud or imposition. And it is certain that however ingenious the fraud or coercive the influence may be, it is of no consequence if there was intelligence enough to detect and strength enough to resist them."

In re Holman's Est., 70 Pac. (Or.), 909 (p. 914).

"No one has suggested that the testator's mind was in a weakened condition, or subject to the insidious influence of another at this time. He was robust and healthful, both in mind and body; and if he could have been induced to depart from the dictations of his own volition and judgment, it must have been by sheer force of a *superior* mind or through *some fraudulent practice,"* and what was said in that case at page 910 can equally be said in this: "If there was any dominance in mentality, it is not apparent from the record."

Myers vs. Hanger, 98 Mo., 439.

"There is no evidence of fraud or deception practiced upon the testator; and, in view of the fact that there is no such evidence, the will ought not to be set aside for undue influence on the part of the wife and sons, until it is shown that considering the state of mind of the testator, the influence was of such a degree as to destroy his free agency."

(b) The Circumstances Attending the Execution of the Will and Codicils.

The will, dated May 18, 1899, was drawn by Mr. Cecil Brown in his office in Honolulu; prior to its being drawn the testator, some time during the month of May, went to Mr. Brown's office, bringing with him, as well as Mr. Brown can recollect, a previous will, which differed only from that of May 18, 1899, in that in it Charles Notley Junior's name appeared as a beneficiary, instead of the children of Charles Notley. Mr. Notley told Mr. Brown that he wanted the will changed so that his son, Charles Notley, should not get any money, but his son's children should get his share and that the income should be held until the children became of age (R., 20, 21), and the will was drawn according to Mr. Notley's instructions (R., 23). Mr. Brown made a draft of the will, read it over to Mr. Notley, and on his approval of it had it typewritten; Mr. Notley took the will away with him, and on the 18th of May came back to the office and executed it; it was put in an envelope and delivered by Mr. Notley to Mr. Brown (R., 21). Mrs. Danford was not present at the execution of the will nor at the execution of either codicil, and was never in Mr. Brown's office until after Mr. Notley's death (R., 28). At the time he executed the will "he was perfectly competent to make his last will and testament; thoroughly understood it and the nature of the business he had in hand and the disposition he wished to make of his property, and "from the time of its execution to the time of his death he never expressed any dissatisfaction with the will to Mr. Brown" (R., 28), nor is there any evidence of his doing so to any one else. The executors named in the will were T. R. Walker and A. Lidgate.

The codicil dated August 2, 1900, was executed at Mr. Notley's home in Paauilo, Hawaii. Mr. Notley had been in Honolulu earlier in the year and had asked Mr. Brown

if he had any objection to serving with Mr. Lidgate as one of the executors of his will, in place of Mr. T. R. Walker, who was leaving the islands permanently. Mr. Brown told him he had none whatever, and later, on Mr. Notley's return to Hawaii, Mr. Brown received a letter from him requesting him to draw a codicial, substituting his (Brown's) name for that of Mr. Walker. The codicil was prepared by Mr. Brown, sent up by him to Mr. Notley at Paauilo, and was returned duly executed to Mr. Brown (R., 21).

The evidence further shows that at this time Mrs. Danford was with her husband at Kilauea, Kauai, another island several hundred miles distant.

The second codicil was dated April 11, 1902, some three weeks before Mr. Notley's death. According to the undisputed testimony of Mr. Brown, prior to his receiving instructions from Mr. Notley, the latter had been going frequently to the office of Mr. Brown, depositing and drawing money, etc. (R., 21). On one of these occasions he asked for his will, broke the seal of the original envelope, and read the will in the office and afterwards gave Mr. Brown the instructions to draw the codicil (R., 22). He told Mr. Brown that he wanted to make a change in the will; that he had been thinking the matter over and that he had come to the conclusion that the homestead should be given to Mrs. Danford and not to his son David, and that he wanted it fixed so that his wife should have the use for her lifetime of the cottage and furniture she had been in the habit of using (R., 21). On Mr. Brown's suggestion the codicil when prepared was brought to Mr. Notley at Mrs. Danford's house, where he was staying, and there executed on April 11, 1902, openly on a veranda fronting the street (R., 22). Mrs. Danford was not present at its execution and was only seen by Mr. Brown when she appeared with pen and ink, called for by Mr. Notley (R., 24-60). Mrs. Notley, widow of the testator, was at that time living at Mrs. Danford's house, having arrived there on March 28 or 29, 1902 (R., 237).

Of the mental capacity of Mr. Notley at that time Mr. Brown speaks as follows: "I am just as positive that he was in full possession of his faculties as I am today; that he knew what he was doing and executed it of his own free will (R., 59, 60). And in this he is corroborated by Dr. Herbert (R., 13, 20).

After the execution of the codicil it was retained by Mr. Brown and remained in his possession until it was opened after the death of Mr. Notley. That Mr. Notley was fully cognizant of the nature of his will is shown by the circumstance related by Mr. Brown of Mr. Notley's reminding him in the course of conversation at some time subsequent to the execution thereof that his will provided that the executors should serve without bond (R., 22).

The only evidence as to any knowledge on the part of Mrs. Danford as to the existence or contents of any will is that furnished by herself when testifying as a witness called by the contestants, she stated, in reply to a question put to her by her own counsel, "that her uncle had told her that she was going to have the homestead." See evidence of Charles Notley (R., 241). There is no evidence that she ever even saw the will or codicils.

(c) No Secrecy or Other Suspicious Circumstances Attending the Execution of the Will.

In the absence of any testimony from Mrs. Notley (widow), who was one of the contestants, no inference can be drawn either way as to whether or not she was informed by the testator of the provisions of his will and codicils or whether or not she discussed them with him. "Wills are usually made with secrecy and are rarely published to the world" (*Loemnicker's Will,* 112 Wis., 461, p. 467), and no special secrecy was attached to the execution of the testator's will and codicils. Mrs. Maria Hughes, daughter of the testator, testifies that on two occasions, February,

1900, at Paauilo, and April, 1901, at Honolulu, the testator spoke to her about his will, saying on the first occasion that "he had been thinking strongly of making Charlie one of the executors of his will," and on the second, "Mr. Walker is going away and I will have to get another executor" (R., 264, 275).

The first codicil was brought by Mr. Notley to the office of the Hamakua Mill Co. at Paauilo, and there witnessed by the bookkeeper and engineer of the company (R., 29, 30), and the second, as has already been stated, was executed on the lanai of Mrs. Danford's house in Honolulu, fronting Kinau Street.

In *Tyler vs. Gardner*, 35 N. Y., 559, cited by contestants, on pages 584 and 593 are enumerated various familiar and marked indicia of the exercise of undue influence; for instance:

> "The studied privacy attending the preparation and execution of the will, the constant presence and vigilance of the principal beneficiary, and her omission to advise the son and grand-son of her mother's approach to death" (p. 593); "the weakness and exhaustion of the testator,—the entire departure from previous testamentary dispositions; the false impressions under which the will was made; the active agency of the beneficiary in procuring it to be drawn; her presence at the testamentary act; and the absence of those who had, at least, equal claims upon the justice of the testator" (p. 584) and "the preparation of instructions for the will by the principal beneficiary" (p. 589).

Conceding the above to be familiar and marked indicia of undue influence, we ask, Where is the evidence of such indicia or any of them in the case at bar? Where is the evidence of any studied privacy—of the constant presence and vigilance of Mrs. Danford, admitting at this place, for the sake of argument, that she is the "principal beneficiary"—of any false impressions under which the will was

made—of the weakness and exhaustion of the testator—of the active agency of Mrs. Danford in procuring the will to be drawn—of her presence at the testamentary act, and the absence of the rest of the family?

We submit that an examination of the record will disclose no such testimony. We call the court's attention to the evidence as to the presence of members of the testator's family during his last illness. The record discloses the fact (uncontradicted) that when Mr. Notley was ill in December, 1901, Mr. Lidgate visited him every day, saw that he was gradually getting worse with only Japanese servants waiting on him, and after consulting his physician, Dr. Irwin, he wrote to Mrs. Danford urging her to go up to Paauilo. Mrs. Danford went up and stayed with Mr. Notley until he was strong enough to go to Honolulu, when he returned with her (R., 38), that later Mrs. Notley told Mr. Lidgate that her grand-daughter, Keala Notley (daughter of Charles Notley), had received a letter from Mrs. Danford "requesting or advising" them to go to Honolulu, as Mr. Notley was not as well as he had been (R., 46); that Mrs. Notley and Keala Notley arrived in Honolulu on March 28 or 29, 1902 (two weeks before the execution of codicil 2), and Mrs. Notley went immediately to stay at Mrs. Danford's house with her husband (evidence of Charles Notley, p. 237); that on the doctor's visits he usually saw Mrs. Notley in her husband's room, and that she shared in the nursing of her husband (R., 15-17); that Charles Notley had been out to Mrs. Danford's house at least twice between February, 1902, and the arrival of his mother; that after his mother's arrival he went there frequently and saw Mr. Notley; that sometimes on his visits he saw his father for a length of time; that for some time he was not allowed to enter the house because of the presence of measles in his family; that later he was sent for by the Danfords and for about a week before Mr. Notley's death he and other members of the Notley family were at Mrs. Danford's house "pretty nearly all the

time" (R., 236-238); that Mrs. Danford more than three weeks before Mr. Notley's death, while driving with him, met Mrs. Maria Hughes and told her, who had not spoken to her (Mrs. Danford) or recognized her since her marriage (October, 1898), not to let any differences between them interfere with Mrs. Hughes' going to her (Mrs. Danford's) house and seeing her father (R., 268, 269), a fact which was only admitted by Mrs. Hughes on the insistence of the court that she answer the questions put to her; that present at Mr. Notley's deathbed were (amongst others) Mrs. Notley (widow), Charles Notley, Lily Notley, David Notley, and Mrs. Maria Hughes (R., 238).

(d) The Will and Codicils Evidence Undue Influence.

There being no suspicious circumstance, so far as we have been able to find, attending the execution of the will and codicils, counsel claim that the will and codicils themselves are evidence of the undue influence and of the increasing undue influence of Mrs. Danford.

It can hardly seem possible that counsel in the preparation of their brief had in mind the provisions of the will and codicils. It is more reasonable and more just to them to assume that they had in mind the facts of the cases cited by them (*Tyler vs. Gardner*, 35 N. Y., 583; *Delafield vs. Parish*, 25 N. Y., 1, and *Rollwagen vs. Rollwagen*, 63 N. Y., 504), and to which we earnestly direct the attention of the court. In *Tyler vs. Gardner* "the faculties of the testator were enfeebled by long and wasting disease;" "the will originated with the chief beneficiary, who framed the written instructions, engaged the counsel, and superintended the execution." In *Delafield vs. Parish* for some seven years before the testator's death the court found on the evidence that an attack of paralysis had "extinguished his intellectual powers, so obliterated and blotted out his mental faculties that after that period he was not a man of sound mind and

memory; he then ceased to be Henry Parish and was no longer *an accountable thing*. During this period three codicils were prepared at the suggestion of Mrs. Parish, all vastly increasing the share devised to her."

In *Rollwagen vs. Rollwagen* "the testator was a confirmed invalid, having nearly lost the power of speech; his infirmities continued to increase—he was paralyzed (p. 507) and during the year 1872 (in which the will was made) he could not utter a word or make an intelligible sound; no business was done in his name without the sanction of his wife; he was entirely dependent upon her for all his wants (p. 509); she procured the will to be drawn, instructed the scrivener and had it executed when he was speechless (p. 521); when he was dying she refused to send for his sons upon the pretense that the dying father did not want to see them (p. 545)."

And it is from these and similar cases that the contestants cull isolated sentences and urge them upon the court as authority in the case at bar.

In the case at bar the strength of body, mind, and character of Mr. Notley is undisputed; there is not a scintilla of evidence that the business affairs of Mr. Notley were ever even mentioned by him to Mrs. Danford, and, as we shall show later, there is no evidence that Mr. Notley was in the least degree dependent upon Mrs. Danford for anything.

Provisions of Will.

After the usual directions as to the payment of his debts and funeral expenses, the testator in his will first made some small bequests out of his property, the value of which is estimated at from $350,000 to $400,000 (R., 29). He gave to his own brother $500 and to his brother-in-law, the husband of his own sister, the father of his niece and adopted daughter, $500.

The next bequest is that of $1,000 to Miss Barnard, who, contestants claim, "apparently had no claim on testator ex-

cept as the friend and protégé of Mrs. Danford." This lady is a sister of Judge Barnard, of Laupahoehoe, Hawaii, and a niece of the late Mr. Barnard, for many years chief clerk of the supreme court of Hawaii (R., 39); against her character there is not a word in the record. She was for a number of years an inmate of Mr. Notley's house, and, so far as the record shows, prior to that she had been living at a neighbor's house for a number of years and teaching in a Government school; finally the gentleman at whose house she was living died rather suddenly, and *Mr. Notley* thought there was no suitable place for her there, and *he* invited her to his house (R., 40), and she remained there until Mrs. Danford's marriage, in 1898. She undoubtedly was a friend of Mrs. Danford, as well as of Mr. Notley. The contention of contestants is that the bequest to her is an *indicium* of undue influence, and such contention is based upon the inference that, because Charles Notley testified that Mrs. Danford said on one occasion to the witness in the presence of the testator that "she would see that Miss Barnard got something out of the property," Mrs. Danford (though there is no evidence of it) controlled Mr. Notley's free agency so that he was constrained to make the bequest to Miss Barnard, and in doing so to do that which was against his will. Where is the evidence or the fact from which an inference can be drawn that the testator, being a "warm-hearted, kind-hearted man," if left to act freely and unconstrainedly, would not have made the bequest to Miss Barnard, who had been an inmate of his home for many years and whom he treated as he did the other inmates thereof (R., 210)? The same witness testifies that when Mrs. Danford made this statement the testator rebuked her.

Under the main provisions of the will, the residue of the estate is devised and bequeathed to trustees upon the following trusts:

To pay one-sixth of the income thereof to the testator's wife during her life; one-sixth of the income thereof to his

son William during his life, and on his death to his wife during her life; one-sixth of the income thereof to his son David during his life, remainder to his heirs; one-sixth of the income thereof to his daughter Maria (Mrs. Hughes) during her life, remainder to her heirs; one-sixth of the income thereof to the children of his son Charles, share and share alike and payable as they arrive at maturity, and one-sixth of the corpus of the estate to them on the death of the other life tenants; one-sixth of the income thereof to his niece Emma (Mrs.) Danford during her life, and remainder to her heirs.

On the death of Mrs. Notley her share of the income was directed to be divided amongst the surviving life tenants, and a similar provision was made as to the share of the income to be paid to William and his wife on the death of the survivor of them. When all the life tenants have deceased, it is directed that the corpus of the estate shall be divided per stirpes between the children of Charles Notley, Jr., and the heirs of the several life tenants.

There was also a specific devise of the homestead at Paauilo to the testator's son David.

We assume that it will be unnecessary to urge upon this court the propriety of the testator's treating Mrs. Danforth, his niece, when he came to the disposition of his property, in the same manner that he had treated her from the time he brought her to this country, in the year 1885, a child of thirteen years, viz., as a daughter and a member of his family, and the injustice that he would have done her if he had failed to make provision for her.

The will of May 18, 1899, confirms the oral testimony that she was treated as his daughter and a member of his family and his statement to Mr. Brown that she was like his own daughter and he was going to treat her as one of his own children (R., 25).

Such being the circumstances, free from suspicion, surrounding the execution of the will and codicils, contestants

claim that Mrs. Danford had a general evil influence, constantly increasing in force, over the testator, and that from this general influence it can be inferred that he was coerced into executing a will which did not express his own wishes as to the disposition of his property.

It seems to us that what was said in *In re Langford,* 108 Cal., 609, at pp. 615, 616, may aptly be quoted at this point:

> "There is not a single suspicious circumstance immediately connected with the execution of the will or the codicil. * * * The contention of the respondents when thoroughly sifted, seems to be about this: that there is evidence to the point that appellant had a general influence over the deceased which ought to be classified as 'undue,' and that therefore, although when he made his will, he was apparently free to act as he pleased, yet it must be inferred that this general influence of appellant accompanied him, subverting his volition and coercing him to act against his real wishes. *To maintain such a strained and difficult theory would require evidence very different from that presented in the record.*"

In that case there was evidence of estrangement between the testator and his children by his first wife, for which the contestants blamed the appellant (625), evidence that before the second marriage there had been illicit relations between the testator and his second wife, and that deceased told contestants that he could not avoid the marriage, and other evidence with the view of showing that before her marriage the appellant made some attempts to captivate the affections of the decedent (for facts see pages 615-626), and the court, after reviewing the evidence, said:

> "Looking through the transcript in this case we see no evidence at all to warrant a jury in annulling the solemn acts by which the decedent executed his will and republished it in the codicil.
>
> *In re Donovan's Estate* (Cal.), 73 Pac., 1081.

> "It appeared from the testimony of the contestants that after the second marriage of their father their lives became a veritable hell on earth. By the terms of his will the testator gave $1 to each of his children and the remainder of his estate to his widow. He lived for three years or more after the making of the will, and there is not the slightest evidence in the case to show that the widow directly influenced him in his testamentary act or even knew of the will until after his death. General influence not brought upon the testamentary act, however controlling, is not undue influence such as will afford ground for the setting aside of the will of a person of sound mind."

As to the claim that the provisions in the will were due to undue influence, we remind the court of the rule of law earlier herein quoted: That "it is not sufficient to show that the circumstances attending the execution of a will are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that they are inconsistent with a contrary hypothesis;" and "If from all the facts and circumstances existing when the will was made an inference can be drawn that the provisions are such as he intended them to be and such as he would have made if no influence had been exerted upon him, the latter inference is at least as probable as the former and the burden of proof in the attack upon the will is not sustained."

The inferences that undue influence was responsible for the dispositions made in the will must be unavoidable, and can only be justified when they result logically and naturally from the facts proved, and furnish the only reasonable explanations of these dispositions.

In this connection the circumstances surrounding the beneficiaries or those excluded from participation in the will must be considered, so that the court may judge for itself whether they are inconsistent with the proposition that the will was the free and spontaneous act of the testator.

First, with regard to Mrs. Notley. She, it is true, was a distant connection of Mr. Samuel Parker and an Hawaiian by birth; a lady whose virtues we will not attempt to disparage; as shown by the evidence of Mr. Samuel Parker and Mr. Chillingworth, a good housekeeper, who in the early days at Waimea kept her house "neat and clean," with "nothing offensive in her talk" (R., 88), "always pleasant to visitors" (R., 90), "a close, industrious housekeeper, her reputation widely known as a hard worker" (R., 101); she treated her guests "with the greatest courtesy, showing (us) rooms, arranging the clothing, gave us water to perform our ablutions, with all general attentions shown by a good housekeeper" (R., 102).

All this is uncontradicted by the proponents; but we claim that the facts proved show that Mrs. Notley was an uneducated woman, who, during her forty-three years of married life, never learned to converse in the English language, and whose aims and ambitions as her husband prospered never rose above household work and the simple habits and customs of her early life when she and her husband were in humble circumstances. We say this with all respect to Mrs. Notley and in no sense of disparagement; it is a matter of common experience that some men and women, as their conditions rise, rise with them; others do not—either because they cannot, or because they care not to do so. Mrs. Notley seemingly, from the evidence, belongs to the class that do not. Hardly a witness comes on to the stand who does not testify that her usual occupation was and most of her time was spent in "washing and ironing" (see evidence of Emma Notley, R., 121, 133, 136; evidence of John Tavares, R., 183; evidence of Keala Notley, R., 325); and from a question of Mr. Kinney's (R., 65), it would appear that he had been informed that the old lady was "washing clothes" when she stayed with Mrs. Danford prior to Mr. Notley's death. She clung to the native fashion of dressing, going around the yard, in a "muumuu" or native chemise

when pursuing her usual occupation, and she still continued to do the washing and ironing in the years when Mr. Notley was in a position to and did employ household servants. She, like many old Hawaiians and the aged of all other races, had prejudices against innovations; for instance, one peculiarity of hers was that she would never ride in a carriage (see evidence of Mr. Lidgate, R., 46, and Emma Notley, R., 160), preferring in March, 1902, to come to Honolulu by schooner from Paauilo, which sometimes takes days on the trip, rather than drive to Kawaihae to catch the steamer. As she said to Mr. Lidgate, "she had never ridden in a vehicle in her life and was not going to begin now." This incident occurred some two and a half years after Mrs. Danford's marriage and at a time when her grand-daughter Keala was managing the homestead and the servants. She clung to Hawaiian food and always, even before Mrs. Danford's arrival, when eating it took her meals separate and apart from Mr. Notley and the rest of his family. (See evidence of Emma Notley, R., 127, 166.)

Mr. Notley's estate was valued at from $350,000 to $400,000, and of the income of this she was bequeathed one-sixth for her own separate use and expenditure, her children being grown and otherwise provided for, so that even at a low rate of interest she was assured some $5,000 to $6,000 a year. Was this an inadequate sum for a woman of her tastes and habits, and is it not reasonable to suppose that in disposing of his property the testator took such matters into consideration? At the most, however, this provision in the will is merely in the nature of a suggestion of the testator's wishes with regard to her and in no way binding upon her. There is a legal maxim that "every one is presumed to know the law," and Mr. Notley and Mrs. Danford, too, are presumed to know that he could not, unless she (Mrs. Notley) consented, take from her what the law has secured to her. As a matter of fact, the records in this case show that Mrs. Notley has chosen her dower rights, since

the trial in the court below; that she is no longer one of the contestants, and does not join in this writ.

With regard to Charles Notley, Jr., the transcript shows that he was guilty of defalcation in 1895 of Government funds while in the custom-house at Hilo; that Mr. Notley was aware of this to his sorrow and spoke very bitterly of it to Mr. Lidgate. Mr. Lidgate speaks of Mr. Notley's "confiding to him that he had paid James Castle a check of $5,000 to keep Charlie out of jail," and also of the change that this matter wrought in Mr. Notley's feelings towards his son in consequence. "He was quite against him then" (R., 42, 43). See also the evidence of Mr. Cecil Brown (R., 24, 26), to the same effect. He testifies also as follows (R., 25): "To use a common expression he (Mr. Notley) had no use for Charlie. He talked to me about him time and time again. He told me it hurt his (Mr. Notley's) reputation," and "that he resigned from the Constitutional Convention (1895) on account of Charles" (R., 27); also, "He also blamed Charles for causing trouble between himself and his wife; this was in the latter part of 1900 or 1901" (R., 25). "That Charles was writing to his wife, and had complete influence over her" (R., 27).

Further, it is worthy of note that Charles never denied that he had been writing to his mother and using his influence with her to thwart his father's plans.

It was not alone to Mr. Cecil Brown and Mr. Lidgate that Mr. Notley revealed his feelings. Mr. Frank Andrade, who received an option in 1899 on Mr. Notley's interests on the Island of Hawaii at $1,000,000, testifies (R., 95, 96) that Mr. Notley was particular that "Charles should not know of the option, the whole transaction might be knocked on the head;" that (R., 96, 98) "his wife was in the hands of Charles and that Charles had more influence over his mother than he himself had;" that "he had spent a lot of money over Charles, but that he was a rascal." This must be what contestants refer to when they say "he *defamed* his son Charles to Mr. Andrade."

David Notley testifies (R., 280, 281, 296) that his father complained "that Charles had more influence over his wife than he had," and "he led me to believe that the papers had not been executed by her (Mrs. Notley) through the influence of my brother."

The testator wrote (see Exhibit 10, R., 371) on September 21, 1899, to his son William at Molokai as follows:

> "Your brother has not written to me of seeing you, I don't have anything to do with him for he has behaved to me like a 'brute.' "

Mrs. Hughes (R., 265) testifies that in April, 1901, Mr. Notley said to her: "Did you hear anything, the trouble we had about your brother Charles? I said, 'No. I haven't heard anything. Mother had been trying to tell me something, but I told her I didn't care about those things.' "

From the lips of Charles Notley himself we know that he had trouble with his father in February, 1899, and that the testator on that occasion, in the presence of witnesses, accused him of spreading some report derogatory to the character of some lady friends of his, and that the interview lasted about an hour, and at the conclusion of it Mr. Notley called him a liar to his face (R., 234, 256, 257). He testifies (R., 241) that on this occasion, after every one else had left, Mrs. Danford made a threat not against him, but with reference to Miss Barnard, saying: "I will see Miss Barnard gets something out of this property," and mark what he testifies about Mr. Notley rebuking her: "He (Mr. Notley) said to her, 'Get back, get back.' " It is hard to imagine how that language shows submission on Mr. Notley's part to her interference.

We know from the transcript that Mr. Notley was "as honest a man as ever walked the earth," and, in the light of the above extracts from the testimony as to his feelings towards and his statements against his son Charles and of the criminal conduct of that son who brought dishonor upon

him, whom he also believeed to be a liar and a slanderer of women, can it be held by this court that the only reasonable explanation for the fact of his being disinherited is undue influence on the part of Mrs. Danford? Can it be said that these facts proved are inconsistent with the theory that the will was the free and spontaneous act of the testator? Can it be held that they are consistent with the theory in this case—"a strained and difficult one at best"—that his free agency was overcome and that he did something which was contrary to his own wishes? Can it be said that he was acting under false impressions as to his son Charles, produced in his mind by Mrs. Danford—there being not a tittle of evidence that she ever made any representations to Mr. Notley about him? False impressions! Mr. Notley was laboring under no false impression when he stated that he had to pay money to keep Charles out of jail. The defalcation of Charles was no false impression, his counsel throwing around him the protection of the rule "that he was not bound to incriminate himself" when he was questioned on the witness stand in reference thereto (R., 243-245). The slander of the fair name of women was no false impression. Charles Notley testifies (R., 255) that "somebody had started a rumor derogatory to their characters," and (R., 234) "it was on account of some words spoken that my mother had said and he (Mr. Notley) attributed it that I had said it."

We contend that Charles' own conduct furnishes the reasonable explanation of his disinherison, and that it is "at least as probable" as the inference that such disinherison was the fulfillment of a threat made by Mrs. Danford that "she would see that he got nothing out of the property," and that, too, in the absence of any proof (other than what it is claimed the will itself affords) that Mrs. Danford ever attempted to carry out the threat.

To justify the inference contended for by contestants the court would be obliged to blot from the record all the evidence above quoted as to Charles Notley's relations with his

father. Even at the risk of wearying the court we quote again the language of the court in *Schuchardt vs. Schuchardt*, 49 A. (N. J.), 485, at page 488:

> "It is not necessary to determine whether testator's indignation as to the conduct of his wife and children was justified or whether he ought not to have overlooked it and forgiven them. If the proofs show that the indignation existed, and for a cause that might occasion it, and the disposition made by the will would be the natural result thereof, the attribution of such disposition to undue influence cannot be supported."

Could any language be more applicable to the case at bar?

The disinheriting of Charles did not result in the aggrandizement of Mrs. Danford's equal share with the other members of the family; her share was not increased thereby to the value of one cent. The property which was not devised and bequeathed to him was given to his children, for whom the testator had an honest and sincere affection, and towards whom his feelings were ever the most kindly, his conduct most generous. These children he had educated practically at his own expense and had cared for from the time of Charles' trouble in Hilo in 1895 until his death.

The testator had been liberal to his son Charles even after the latter had disgraced his name. According to the admission of Charles, he had received from $15,000 to $20,000 from his father (R., 249, 250); his father had paid him for work done in connection with property (R., 228); his father gave him money freely (R., 243), but when the question of the disposition of his property by will arose Charles "was tried and found wanting."

The testator's idea in giving to his (testator's) children the income from his property and not the corpus of the estate was that if he were to do otherwise the probability is that it would have been squandered, and he does not treat Mrs. Danford different from the rest. This, we claim, clearly ap-

pears in his complaint to Cecil Brown at the time he gave him the instructions for his will. "He told me he gave each of his children $5,000 out of the first dividend, and the only one who took any care of it was David; the rest of them squandered all their money" (R., 66).

The only differentiation made between Mrs. Danford and the other members of the family is where, under the second codicil, she receives the homestead and its contents, the homestead being described in the codicil dated April 11, 1902 as containing "about four acres." The homestead at Paauilo might either have been disposed of under the will so that for a time it should be used as a residence for the family; it might have been directed to be sold for the benefit of the estate; the only other alternative was to give it to some special beneficiary. The testator chose the latter course and devised it in the will to his son David, and later by the second codicil to his niece, Mrs. Danford, without any solicitation apparent on the record on her part.

Before leaving this branch of the case we remind the court that there is absolutely no evidence in the record of any persuasion, suggestion, or importunity used by Mrs. Danford with regard to the manner in which he should dispose of his property, and that from the lips of Charles Notley (R., 256-257) we learn that he never heard Mrs. Danford make any suggestions to the testator about his will or his property; and from those of Mrs. Charles Notley, reluctantly, that she never heard Mrs. Danford make any suggestion or request to Mr. Notley in connection with his property (R., 173-174), and, with the exception of the statement of the disinherited son, Charles, that Mrs. Danford said to him in the presence of his father, "I will see that Miss Barnard gets something out of the property," there is not a scintilla of evidence in the record that she ever addressed a word to the testator on the subject of the disposition of his property. Even if there had been evidence that Mrs. Danford suggested to the testator the disinheriting of his son or

the bequest to Miss Barnard, this would not have been sufficient without proof that the testator was not left free to follow his own judgment. (See Schouler on Wills, § 233, cited in Wheeler's Will, 25 N. Y. Supp., 313:)

> "Nor is it necessary that the particular will and its provisions should have originated with the testator, provided he understands and adopts and sanctions whatever disposition was proposed and embodied in the instrument."

It was claimed in the courts below that the will is unnatural, and in answer to this we would say that, using the language of the supreme court of Hawaii, a testator may make even what is sometimes called an unnatural will if he does so freely and with a sound mind. (See *In re Langford*, 108 Cal., 608:)

> "The consideration of the question whether or
> "not a will is 'unnatural'—by which is meant, we
> "suppose, different from what it might have been
> "expected to have been—is of no importance except
> "in a case where there is some evidence immediately
> "tending to show mental incapacity, fraud or undue
> "influence; in which event it might serve to help
> "out a weak case. But there is no evidence in the
> "case at bar that could be thus helped out. A will
> "cannot be upset *because* in the opinion of a jury
> "or court it is unnatural. In the opinion of the
> "McDevitt case it is said: 'Although I do not think
> "'it of special interest here, it is well to remember
> "'that one has the right to make an unjust will, an
> "'unreasonable will, or even a cruel will. Generally,
> "'such questions turn our thoughts, as they are often
> "'intended to, from the only question at issue, which
> "'always is, only, is the will the spontaneous act of
> "'a competent testator? Of course juries lean against
> "'wills which to them seem unequal or unjust. But
> "'the right to dispose of one's property by will is
> "'most solemnly assured by law, and is a most valu-
> "'able incident to ownership, and does not depend
> "'upon its judicious use. The beneficiaries of a will

"'are as much entitled to protection as any other
'property owners, and the courts abdicate their func-
"'tions when they permit the prejudices of a jury to
"'set aside a will merely upon suspicion, or because
"'it does not conform to their ideas of what was just
"'and proper.' * * * And indeed, if it were
"important to consider it, we do not see how the
"will in the case at bar can be considered unnatural
"in such extreme case as to be remarkable. At the
"time of the execution of the will the contestants—
"children of the first wife—were all grown up,
"middle-aged people, with families of their own.
"He had seen but little of them after his marriage,
"and in a few years afterward he had moved away
"from them to California. They had strenuously
"opposed the marriage, and had said unkind things
"to his wife; and, as was very natural, there was not
"much social intercourse between the families after-
"ward. * * * Of course, the contestants at-
"tribute this to the influence of the appellant, and
"they testify to statements which they say the de-
"cedent made to them tending to support that view;
"nevertheless the fact was that they came to Cali-
"fornia against his protests and thereby greatly dis-
"pleased him. * * * Looking through the
"transcript in this case we see no evidence at all
"sufficient to warrant a jury in annulling the solemn
"acts by which the decedent executed his will, and
"republished it in the codicil. If the law is to be
"changed, and the right of disposing of one's prop-
"erty by will, the policy of which has been sanc-
"tioned by the wisdom and experience of many gen-
"erations of men, is to be taken away, that result
"must be effected by the legislative department of
"the government. As the law now stands that right
"cannot be frittered away after the death of the tes-
"tator according to the tastes and notions of others.
"It is quite likely that in the case at bar the pro-
"visions of the will did not meet with the approval
"of the jurors; but their approval was not necessary."

And in *Cauffman vs. Long*, 82 Pa. St., 72:

"The growing disposition of courts and juries to "set aside last wills and testaments, and to substitute "in lieu thereof their own notions as to what a "testator should do with his property, is not to be "encouraged. No right of the citizen is more valued "than the power to dispose of his property by will. "No right is more solemnly assured to him by the "law. Nor does it depend in any sense upon the "judicious exercise of it. It rarely happens that a "man bequeaths his estate to the entire satisfaction "of either his family or friends. In many instances "testamentary dispositions of property seem harsh, "if not unjust, the result, perhaps, of prejudice as "to some of the testator's kindred, or undue partiality "as to others. But these are matters about which we "have no concern. The law wisely secures equality of "distribution where a man dies intestate. But the "very object of a will is to produce inequality, and "to provide for the wants of the testator's family; "to protect those who are helpless; to reward those "who have been affectionate, and to punish those "who have been disobedient. It is doubtless true "that narrow prejudice sometimes interferes with the "wisdom of such arrangements. This is due to the "imperfections of our human race. It must be re-"membered that in this country a man's prejudices "are a part of his liberty. He has a right to them; "he is entitled to the control of his property while "living, and by will to direct its use after his death, "subject only to such restrictions as are imposed by "law. Where a man has sufficient memory and "understanding to make a will, and such instrument "is not the result of undue influence, but is the un-"controlled act of his own mind, it is not to be set "aside in Pennsylvania without sufficient evidence, "nor upon any sentimental notions of equality."

Will not only Unrevoked for Three Years, but Twice Ratified by Codicil.

One more fact is worthy of notice, viz., the fact that the will stood for nearly three years after its execution—unrevoked, with full knowledge on Mr. Notley's part of its contents, and no expression of dissatisfaction with it ever fell from his lips, though he was constantly thereafter visiting and being visited by his family; instead of any dissatisfaction being shown, we find the testator by two codicils ratifying his will.

Mrs. Hughes' evidence is that in February, 1900, she paid a visit to Mr. Notley at Paauilo; that during that visit the testator said to her "he had been thinking strongly of mak-" ing Charlie one of the executors of his will" (R., 264); that " she judged from that remark that he was quite friendly " with Charles." Mrs. Danford at this time was on the Island of Kauai with her husband and did not revisit Paauilo until November, 1900. Charles' two daughters took her place and looked after the homestead, and nevertheless a codicil is executed at Paauilo in August, 1900, appointing Mr. Brown as executor and republishing the will.

In December, 1900, the testator was living at Mrs. Hughes' house in Honolulu for three weeks. Charles was entertained there on Christmas day and Charles frequently met his father there and had long conversations with him, Mr. Notley saying to Mrs. Hughes "it was nice to see him come out there" (R., 264). Mrs. Danford was on Kauai. Mr. Notley's enjoyment of his son's society was not had clandestinely and hidden from Mrs. Danford. He wrote to her, telling her of the Christmas dinner in a letter which she read aloud in the presence of Charles Notley's son John (R., 353, 354). But no change was made in the will until on April 11, 1902, a codicil was added, and the will in all other respects was republished.

On this subject Underhill in his Law of Wills, at page 189, speaks as follows:

> "The fact of the continued existence of the will unrevoked, in the total absence of declarations, is, where the testator has had the opportunity to revoke, a circumstance of some value in throwing light upon the character of his will."

And again, on page 296:

> "If the will is the product of undue influence, and the deceased subsequently when he is entirely free from such influence, executes a codicil referring to or expressly ratifying the will, the will is validated by the codicil."

See also *Caughley vs. Bridenbaugh*, 208 Pa. St., 414 (p. 429:

> "If (as is profoundly remarked in *Robinson vs. Robinson*, 203 Pa. St., 425) thwarted weakness is evidenced by complaints accompanied by inaction, it must also be true that uncontrolled freedom of action is shown by an absence of complaints reinforced by positive expressions of satisfaction and acts unequivocally indicative thereof."

In concluding this branch of the case we cite 110 Wis., 70, *In re Butler's Will*, at page 79.

The court, after reviewing the facts (as to family quarrels, etc., pages 71 to 75), says:

> "The situation had not arisen when a presumption of undue influence arises, and even if it had, still the clear and undisputed testimony of the testator's independent action in the dictating of the terms of the will, in connection with the other facts in evidence showing that the will was the result of the testator's own determination, would be entirely sufficient to overcome the presumption."

THERE IS NO EVIDENCE THAT MRS. DANFORD HAD A GENERAL INFLUENCE, EITHER OF LAWFUL OR UNLAWFUL NATURE, OVER THE TESTATOR.

It now remains to consider what, if any, evidence there is to establish the contentions of contestants that Mrs. Danford "possessed and exercised a general influence over Mr. Notley, and inasmuch as the existence of the special influence said to have been exercised over the testamentary acts can in this case (as admitted by counsel) be established merely, if at all, by inferences to be drawn from a general influence in the every-day matters of the testator's life, the law demands that the general influence must be satisfactorily established *by proof of facts showing such general influence*, and that *it cannot itself be the subject of inference*. In other words, "an inference cannot be based on an inference."

Gillett's Indirect and Collateral Ev., § 51.

And even if the facts should establish proof that Mrs. Danford possessed and exercised such a general influence, which they certainly do not, such influence must be unlawful in its nature.

Dean vs. Negley, 41 Pa. St., 312.

> "Lawful influence, such as that arising from legitimate family and social relations, must be allowed to produce its natural results, even in influencing last wills. However great the influence thus generated may be, it has no taint of unlawfulness it in; and there can be no presumption of its actual unlawful exercise merely from the fact that it is known to have existed, and that it has manifestly operated on the testator's mind as a reason for his testamentary disposition. Such influences are naturally very unequal and naturally productive of inequalities in testamentary dispositions; and as they are also lawful in general, and the law can not criticise and measure them so as to attribute to them their proper effect,

no will can be condemned because the existence of such an influence is proved, and because the will contains in itself proof of its effect. *It is only when such influence is unduly exerted over the very act of devising, so as to prevent the will from being truly the act of the testator that the law condemns it is a vicious element* of the testamentary act; so the law always speaks of the natural influence arising out of legitimate relations" (p. 317).

Boyse vs. Rossborough, 6 H. L. Cas., *47-*55.

"The undue influence must be an influence exercised in relation to the will itself, not an influence in relation to other matters or transactions."

1 *Underhill, Wills,* § 144.

McFadin vs. Catron, 120 Mo., 252.

In re McDevitt, 95 Cal., 17 (approved in 108 *Cal.,* 608), p. 633.

"General influence, not brought to bear upon the testamentary act, however strong or controlling, is not undue influence."

We will first point out the main claims made by contestants' counsel and then proceed to discover, if possible, the evidence on which such claims are based. They are:

That "there was abundant evidence that Mrs. Danford was a clever and attractive girl, well educated, and assuming to be socially superior to the members of the testator's family; that she appreciated the opportunity of captivating the testator, of rendering herself indispensable to him, and of securing influence and control over his actions and the distribution of his property; that she continuously and to this end asserted her will, and that her influence and control continued and increased until his death. That he was subservient to her wishes; that he installed her from the beginning as the head of his household, and degraded his wife to a subordinate position; that she pushed aside his wife, sons, daughter, grandchildren, and old Hawaiian friends to make way for her friends; and that he, flattered by her at-

tentions and submissive to her wishes, sacrificed his old associations, ties of kindred and family affection and obligations, to please her."

Contestants introduced in evidence a number of incidents which they claimed tended to establish Mrs. Danford's alleged long-continued and complete dominion over the testator, and which might at first sight appear numerous until it is considered that they were spread over a period of seventeen years, extending from the very first day of her arrival in the country, at about the age of 13 years, until the death of the testator. Some—the mere narration of them will show—were trifling and remote—remote in point of time and of fact—while some were entirely unconnected with Mr. Notley, or if connected with him were unconnected with Mrs. Danford. We deem it but fair to the court, however, to refer to all of these incidents, so that the court may be fully advised of what the evidence was upon which contestants claim that a jury would have been warranted in finding in their favor upon the issue of undue influence.

From the evidence we learn that Mr. Notley came to the islands about the year 1852 or 1853; that he was first employed by the Parker family at Mana "taking care of sheep" (R., 85), and that while in that employment (probably about the year 1858, Charles Notley being born in 1860), he married the present Mrs. Notley; that later he moved to Waimea, where he had a store, and established a tannery, in which he did the manual work, and where he remained until about the year 1877. Mr. Chillingworth made his acquaintance in the year 1867, and there being few white people there, it appears they became very close friends (R., 100).

In the year 1877, the reciprocity treaty having been ratified in 1876, Mr. Notley moved to Hamakua and started in the business of cane planting (the late Theo. H. Davies being agent for his plantation interests), and his business was conducted in 1882 (R., 106) in the name of Chas. Notley & Sons, but there is no evidence of any partnership existing between Mr. Notley and his sons (R., 88, 106). By hard

work, thrift, and perseverance, as the years went by, Mr. Notley prospered and became a large land-owner in Hamakua. The children born to him were five in number: William, the eldest, probably born in 1859, who developed signs of leprosy, and in 1883 was sent to Scotland, returning to the islands the same year, and who was kept isolated at the homestead until in 1887 he was sent to Molokai, where he is still confined; Charles, born in 1861, and married in 1877; Maria, now Mrs. Hughes, married in 1881; Thomas, who died at school in 1877, and David, born in 1867.

In the business of cane-planting Mr. Notley was assisted by his sons William, Charles, and David (R., 106, 87); Maria did the household work, while Mrs. Notley and Charles' wife attended to the washing and ironing (R., 121), no servant except a Chinese cook (R., 91) being employed until the year 1882 (R., 121). The conditions in the family were such as are found in ordinary happy families; there was occasional trouble, one instance being testified to where the domestic relations between Mr. Notley and his wife were ruffled over some Portuguese girls, who were treated too well, in Mrs. Notley's opinion, by her husband (R., 110).

During William's visit abroad, in 1883, he met some of his father's relations—his (Mr. Notley's) father and brother—and early in 1885, his business interests having prospered (J. M. Horner & Sons having leased some of his land at a rental of about $5,000 per annum—see Exhibits 17 and 19), Mr. Notley, after an absence of over 30 years, made his first trip to England, early in 1885. He remained abroad some six months, and during that time he visited his relatives and kept his family in Hawaii aware of his movements and of his reception by his people by writing to his wife, his daughter, and his sons Charles and David, and on his return to Hawaii, in the fall of the same year, one of his sister's children accompanied him. That child, then thirteen years' old and small for her age (R., 271), was Emma Mullinger, the present Mrs. Danford, whose undue influence over Mr. Notley was noticed by Mrs. Hughes on the very

day she landed (R., 308-311), and by whose "undue influence" it is claimed that the free agency of Mr. Notley was overcome in the execution of his will.

In view of the fact that evidence was introduced that before Mr. Notley went to England the family relations were very pleasant, and that the evenings were spent in the parlor, where there sometimes would be singing and playing—evidence of Mrs. C. Notley (R., 125, 126)—and that after the arrival of Mrs. Danford all parties, etc., ceased (R., 131), and the contention made that the inference is that her influence caused the cessation, it is well to examine the record to ascertain the situation and condition of the various members of the family at the time of the arrival of Mrs. Danford, in October or November, 1885.

William, the eldest son, was a leper, and from his return from Scotland, in 1883, until his removal to Molokai, lived in seclusion "in the yard, in a house to himself" (R., 123).

Thomas died in 1877 (R., 122), when at school in Honolulu with David.

David was living at the homestead, a boy of eighteen, and on March 12, 1886, went to San Mateo to college, returning June 10, 1888 (R., 286).

Maria was married in 1881 (R., 257), living for the first two years away from the homestead and down near the plantation mill at Paauilo, until in 1883 she moved to Pepeekeo (R., 121, 269, 270), by that time having one or more children (Ex. 2, R., 367), and, when Mrs. Danford arrived, was in Honolulu, had been there eight or nine months, and did not return to Hamakua until February, 1886 (R., 269), Mrs. Danford having previously, in January or first week of February, been sent to school in Honolulu (R., 164, 277).

Charles Notley and his wife were living at the homestead, and, according to the evidence of Mrs. Charles Notley, Mrs. Danford would sit in the parlor in the evening "on a chair, of course," with Mr. and Mrs. Notley, and she (Mrs. Charles

Notley) testifies, "I didn't remain in the parlor long because I had to go to my children" (R., 142).

Where David, prior to going to San Mateo within a few months of Mrs. Danford's arrival, spent his evenings after his day's work, instead of being cooped up in the parlor singing, does not appear, but of any trouble at any time between Mrs. Danford and himself there is no evidence in the record, and what Charles was doing in the evening does not appear.

Such being the conditions surrounding the members of the family—Maria away from home, William a leper, Mrs. Charles Notley attending to her children—is the inference that Mrs. Danford caused all "social pleasures—singing" (R., 142)—to cease, tenable? Is it what the law requires—a reasonable, just, legitimate, unavoidable inference?

In connection with this matter also must be borne in mind the fact that from Mrs. Danford's arrival, in 1885, until 1888, she was mostly at school in Honolulu; that for a few months in 1888 she was taught at the homestead; that from 1888 to 1892 she was mostly in Honolulu, being educated and living with Captain and Mrs. Mist, and that she did not take care of the house for her uncle until the year 1892.

It is claimed that from Mrs. Danford's first arrival her whole course was one of substitution, the children being driven from the home and the wife deposed as mistress.

(*a*) *Wife Deposed as Mistress.*

Dealing with the latter proposition first, let us examine what the record discloses as to Mrs. Notley's management of the house and her place therein (1) before Mrs. Danford's arrival, (2) after she arrived, and (3) after her marriage and departure from the homestead.

(1) *Before Mrs. Danford's arrival.*

Mr. Parker, whose visits to the family were more frequent in the latter 70's, or, as he puts it, "nearly on to the 80's," after that time he merely passing by and going on through the district (R., 91), testifies that he thinks the Notleys, when he was intimate with them, "always had a cook;" Mrs. Notley did not take much part in entertaining strangers. "She would come in and she would look out for the table part of it" (R., 91), though of course she was always pleasant to visitors at the house (R., 90). Mr. Chillingworth's evidence is confined to the years 1867-1876 or 1877 and latter part of 1879 to early in 1883 (R., 100). He says that Mrs. Notley was "nearly always at the table (R., 101, 112)—she treated us with the greatest courtesy, showing us rooms, arranging the clothing, and gave us water to perform our ablutions" (R., 102). Mrs. Charles Notley testifies that from her marriage, in 1877, Mrs. Hughes attended to the house, doing the cooking and cleaning, while she (the witness) and Mrs. Notley did the washing and ironing and other duties (R., 121); that Mrs. Notley would eat at the table "when she was not pushed with work and when she has her Hawaiian food" (R., 127), which she took "perhaps once or twice a day" (R., 166).

(2) *After Mrs. Danford's arrival.*

When Mrs. Danford first arrived Mrs. Notley spent her evenings in the parlor with her husband and Mrs. Danford (R., 142), Mrs. Charles Notley doing the cooking and keeping house (R., 128) for Mr. Notley and Mrs. Danford in 1887. From 1895 to 1899 Mrs. Charles Notley testifies that Mrs. Notley lived in the main building with her husband, taking her meals sometimes in the main building and sometimes in the cottage with the witness, spending most of the day washing and ironing in an ironing cottage, and going back and forth occasionally between the main building and

the cottage (R., 133, 136). The witness' examination on this subject was confined to the years 1895-1899, and there is no evidence that Mrs. Notley at any time lived elsewhere than in the main house with her husband. A condition once shown to exist is in law presumed to continue until the contrary is shown. Tavares, who did "some little work" in the garden helping his father before going to school and after school hours (R., 183), testifies that Mrs. Notley spent most of her time when in the yard washing and ironing.

(3) *After Mrs. Danford's marriage.*

The evidence of Keala (Victoria) Notley shows that after Mrs. Danford's marriage, and when the witness and her sister (not Mrs. Notley) took Mrs. Danford's place, Mrs. Notley still continued to do her own washing and ironing (R., 325); there is no evidence that during this period Mrs. Notley frequented the family table at meals, though there is positive evidence that she did not go to the table when one guest—Mr. Frank Stanley—stayed at the house (R., 338). During this period the part she took in the entertainment of visitors was seeing "their rooms were fixed up nicely" and telling her grand-daughters, who had charge of the house, "where to put them" (R., 319). Occasionally Mr. and Mrs. Notley and their grand-daughters (Charles Notley's children) spent the evening in the parlor, and "on one occasion" Mr. and Mrs. Notley joked with one another (R., 327). Before Mrs. Danford's wedding there were social entertainments and tennis parties; after her marriage social entertainments and tennis parties continued up to the death of Mr. Notley, the only difference, if any, being that the grandchildren invited to the entertainments people more of their own age (R., 337-340), and we do not find that Mrs. Notley took more part in them during one period than in the other. On Mrs. Danford's return with Mr. Notley from a visit to England, in 1892, the evidence of Charles Notley as to what occurred is as follows: "Mr. Notley said that he was going to

install Mrs. Danford as mistress of the house, and I [Charles Notley] told mother '*the white lady* [referring to his cousin] has been chosen the head of the house,' and she said, 'Pela, is that so?' " There is no evidence that Mrs. Notley resented this, nor is there in the above evidence anything to justify the inference that she was "deposed." There is no evidence that Mr. and Mrs. Notley had or had not discussed the matter beforehand, the lips of Mr. Notley being forever sealed, and counsel refraining from putting on the witness stand Mrs. Notley, who lived at Paauilo practically from the time that Mrs. Danford arrived up to Mr. Notley's death. Other witnesses are called to show how she looked—solemn or happy—whether her relations with Mrs. Danford were friendly or unfriendly—what she said or thought—but from the lips of Mrs. Notley, who was present in court throughout the entire trial, and who from her constant residence at the homestead would naturally be presumed to have the best knowledge of what transpired there, we have not a single syllable, counsel for some good reasons of their own, considering it wisest for her to maintain a complete silence.

From the record we find Mrs. Notley from 1877 up to 1902 following her usual routine. Where, then, is the evidence justifying the claim of counsel that "Mrs. Notley was deposed?" It is claimed that Mrs. Danford pushed aside his old Hawaiian friends to make way for her friends! There is absolutely not a particle of evidence that Mrs. Danford ever prevented or tried to prevent any Hawaiian friend or friend of any other race from visiting Mrs. Notley. Mrs. Charles Notley testifies that after 1895 she doesn't think that there was any native went to the table at that time, and does not remember the Parker family visiting after 1885 (R., 132); recollects later (R., 168, 169) that some Hawaiians did visit the homestead; but, whether Hawaiians did or did not visit the place, there is not a syllable to show that Mrs. Danford ever did or said anything to prevent them visiting or to justify the inference that she was responsible

for their absence. And this is one of the inferences on which the ultimate inference is built that undue influence was successfully exercised over the testamentary act. Furthermore, there is not a particle of evidence to show that the people who did visit the house after her arrival were not Mr. Notley's friends—the friends of his own choosing.

The language of the court in *U. S. vs. Ross,* 92 U. S., 281, at page 283, is applicable to the present case:

> "This presumption" (in the case at bar of undue influence exercised over the testamentary act) "could only have been made by piling inference upon inference and presumption upon presumption. * * * These seem to us to be nothing more than mere conjectures. They are not legitimate inferences even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact, is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

See also—
Gillett's Indirect and Collateral Evidence §§ 51-54.

"An inference cannot be based on an inference."

(*b*) *Interference by Mrs. Danford between Husband and Wife.*

The evidence to substantiate this is found in the testimony of Tavares (R., 184, 185, 189), and is to the effect that he noticed that when Mr. and Mrs. Notley were talking together on a good many occasions sometimes he heard Mrs. Danford calling "Uncle," sometimes he saw her, and then Mr. Notley has to go, and that he "never refused as far as I saw, never refused to go." The record does not disclose why

Mrs. Danford called Mr. Notley away, whether for business purposes or to answer telephone messages, etc., but the inference which the court is asked to draw is that her influence over him was so great that he was at her beck and call, and that these calls by Mrs. Danford were mere pretexts to prevent communication between husband and wife. It strikes one as strange that if this testator, naturally a strong character, was for all these years under the despotism of a stronger mentality no word of complaint of such influence was ever, so far as the record shows, made to any of the members of his family or to any one else.

(c) *The Rose Garden Removed to Make Room for a Tennis Court.*

The claim in connection with the rose garden is that Mr. Notley was compelled by the influence of Mrs. Danford and against the tearful objections of his wife to destroy the garden to make room for a tennis court. Tavares testifies (R., 185-188) that Mr. Notley, in the presence of Mrs. Danford, told witness' father to pull up certain rose bushes; "my father had gone to do the work; then Mrs. Notley came down and talked with Mr. Notley; then she was not crying but you could see the tears rolling down her cheeks;" Mrs. Danford got there when Mr. and Mrs. Notley were together, stayed for about five seconds, and then went into the house; she came back in five minutes—seven minutes—when they all remained together, and Mrs. Danford talked and Mrs. Notley left Mr. Notley in tears, and after that Mr. Notley told witness' father to "go ahead and pull up the rose bushes." What was said by either Mr. or Mrs. Notley or Mrs. Danford the record does not show. The boy could not inform us, and Mrs. Notley, who was under no disability to testify as to what occurred, was not called upon to do so. Instead of placing the facts before the court counsel preferred to present to the court a "dumb show," expecting the

court to draw from such picture without words the inference that Mrs. Danford's influence over Mr. Notley preponderated over his wife's. This tennis court, as shown by the record, was used in common by the niece, grandchildren, and family friends.

What Gillett in his work on Indirect and Collateral Evidence, section 53, says with regard to circumstantial evidence is apposite here.

> "It seems that mere circumstantial evidence ought in no case be called on where direct and positive evidence which ought to have been given, is willfully withheld by the prosecutor."

How easy by Mrs. Notley—one of the contestants—would it have been to introduce "direct and positive evidence" of this occurrence. The one advantage of the "dumb show" is that it could not be subjected to cross-examination, whereas the living witness would have been.

On the contention that Mrs. Notley was deposed of vital rights and privileges we have so far at the least four inferences:

(1) That (although from 1877 to 1886 and from 1899 to 1902 the evidence shows that Mrs. Notley's routine and mode of life was practically identical with that she observed from 1886 to 1899) Mrs. Notley was, by the undue influence of Mrs. Danford over Mr. Notley, degraded to a subordinate position."

(2) That Mrs. Danford pushed aside Notley's old Hawaiian friends to make way for her friends.

(3) That Mr. Notley was at the beck and call of Mrs. Danford, who indulged in mere pretexts to prevent conversations between husband and wife.

(4) That in the conversion of the rose garden into a lawn the influence of Mrs. Danford over Mr. Notley preponderated over his wife's.

The Children "Gradually Pushed Out" and Driven from Home.

(*a*) In the first place, there is not a particle of evidence of any trouble between David and Mrs. Danford, and, so far as the record shows, she never uttered a syllable about him, either in the way of commendation or disparagement, to Mr. Notley or anybody else. His feelings toward her are shown perhaps in the fact that on the day succeeding his father's funeral he went to her house "to thank them" (Mr and Mrs. Danford) "for looking after my father" (R., 298). After he had been two years at San Mateo his father wrote to him to come home (R., 282). Why? Whether David was himself to blame or not we know not. He testifies that his father employed him twice, on the first occasion, in 1888, to count stock and on the second, in 1890, to put an addition to his house, and when he finished his work he, on each occasion, left Hamakua and returned to Honolulu "of his own accord and volition" (R., 287, 288, 293). He lived in Honolulu at a house in Kakaako on which his father had some lien (R., 288, 289), and upon the occasion of his father's visits to Honolulu he was in the habit of dining with him on Sundays (R., 285). His father's influence got him employment as a Government carpenter (R., 293). He worked for a number of years, and was at the time of the trial working on the docks, even though during the time he was so working he had received presents of $5,000 in 1897 and $2,000 in 1899 from his father, and though at the time of the trial he was entitled under his father's will to one-sixth of the income of his father's estate. (See answer to question of the court (R., 285). Cecil Brown testifies that Mr. Notley told him (R., 66) that David was a miser and the only one who did not squander his money, and that he admired David for working on the docks, and pointed out to him (Mr. Brown) that he drove a street car. (See also Mr. Notley's letter to Mrs. Hughes (Exhibit 9) expressing his approval

of David's going to work for Mr. Lucas.) David also testifies (R., 290) that he did not blame anybody but himself for the fact that he was working on the wharves. There cannot be pointed out any evidence showing undue influence on the part of Mrs. Danford exercised against David Notley, and thus again counsel have recourse to another inference manufactured "out of whole cloth" in order to establish their ultimate contention. With equal justice and with equal evidence they might have drawn one more inference that they must have overlooked, viz., that William Notley, the leper, was driven from his home through the same malign influence. It is claimed by contestants that Mr. Notley, as a result of her influence, *complained* of what it cost him to take care of William. The answer to this is found in Mr. Notley's letters (Exhibits 14 and 15), which show the direct contrary.

(*b*) It is claimed with regard to Maria that she and her father were kept apart. It will be remembered that she married, and hence left home, in 1881. The evidence shows that in February, 1886, she went up to Hamakua and stayed until December, 1889, when she moved to Kohala (R., 269, 270); that in 1892 she paid him a visit of three weeks, bringing three of her children with her (R., 271); in 1897 her daughter Maria visited him for three weeks (R., 194); in 1898 Mrs. Hughes stayed seven weeks with him, and paid him another visit of three weeks in February, 1900 (R., 271). Prior to 1897 Mr. Notley paid occasional visits to Mrs. Hughes, in Kohala, one or two to her daughter Maria's recollection (R., 194). He visited also in 1897 at her home in Kohala, when he gave her $5,000 (R., 274), and after she moved from Kohala to Honolulu, in August, 1900, he visited her in December, 1900, and April, 1901, staying with her about three weeks on each occasion. The evidence shows that she had a young family around her, the youngest being a baby born in 1900. How, then, in the absence of direct proof, can it be shown that Mrs. Danford, by her undue

influence, kept Mr. Notley and his daughter apart? By one more inference! There is evidence, however, that in October, 1901, whenever Mr. Notley passed Mrs. Hughes' house on Beretania street alone, he invariably looked in and bowed, but whenever he drove by with Mrs. Danford he would not look in, and if her eyes struck the house and met those of anybody in the house or yard she would look away without any sign of recognition (R., 202–204, 207, 301, 306). *Inferentia sequitur,* that Mr. Notley was compelled against his will when in the company of Mrs. Danford to avoid looking toward the house. It is in evidence that the house stood far back from the street, and also that during that very month while this was happening Mr. Notley called twice a week at the house and no reference to it was made either by Mrs. Hughes or Mr. Notley (R., 204). The witnesses to the above occurrences also testify that for some time previous they had not been on speaking or calling terms with Mrs. Danford, the cause of the differences being Mrs. Hughes' refusal to go to Mrs. Danford's wedding in consequence of Mrs. Danford being styled in the wedding cards "our adopted daughter" (R., 204, 208, 307). What did they expect her to do when she met them? One thing is certainly proved by the evidence, viz., that the differences between these ladies did not prevent Mrs. Hughes visiting her father in 1898 and in February, 1900, and his visiting her in December, 1900, and April, 1901, or his calling on her twice a week in October 1901, when he was visiting at Mrs. Danford's. No general influence exercised by Mrs. Danford over Mr. Notley was strong enough to be successful in interrupting the friendly intercourse of father and daughter. His visits were not the visits of a man who was in fear of a dominating influence—clandestine; on the contrary, we find him writing to Mrs. Danford about the visit of Christmas, 1900 (R., 353, 354), and staying with Mrs. Hughes in April, 1901, when Mrs. Danford had returned from Kilauea, Kauai (R., 206).

(c) *Charles.*—The only other member of the family who has to be considered in this connection is Charles, and the evidence of himself and his wife shows that he was turned out of his father's house on two occasions—first, some time in 1886, within four or five months of Mrs. Danford's arrival (R., 127), and, second, in January, 1888 (R., 129), remaining away about two months on the first occasion and four days on the second. These incidents happened at least thirteen and eleven years respectively before the execution of the will of May 18, 1899, and sixteen and fourteen years respectively before the execution of the second codicil. In each case Mr. Notley himself sent for Charles and his wife to return (R., 130).

The occasion of the first eviction was the refusal of Mrs. Charles Notley to do some sewing for Mrs. Danford, then a child of fourteen years, the reason for the refusal, and one that she expressed to Mr. Notley, being, according to her own testimony, "Because I didn't like her" (R., 137, 164).

What the trouble was which occasioned the second eviction counsel did not see fit to introduce in evidence. Whatever the trouble was, the nature of it was not disclosed on the trial. Mrs. Charles Notley testified that "she did not know whether Mrs. Danford was concerned in it, but the dispute was about her as well as the Lightfoots; Mr. Notley did not believe his son first (evidently it was a story with which in some way Charles was connected); later in the same day he changed his mind and we were sent out of the place for four days, when Mr. Notley believed his son and personally asked them back." According to their testimony, Mr. Notley was very angry with Mrs. Danford and their relations were not friendly, and he and Mrs. Notley brought her to Honolulu with the intention of taking her back to England. What occasioned a change in their plans we know not, Mrs. Notley not being allowed to give any information on the subject, but, while withholding this evidence, contestants claim that she (Mrs. Danford) had sufficient *influence* over him to

prevent the removal, returned to his house, and was reinstated as mistress. She did *not* return to his house, had never up to that time had charge of the homestead, but was placed with the Mist family in Honolulu, remaining there practically till she visited England, in 1892 (R., 145, 146). The trouble over crockery, two weeks earlier, evidenced no hostility towards Charles Notley or enmity aroused against him in Mr. Notley's breast by Mrs. Danford, because his evidence and that of his wife shows him in a very favorable light—that of peacemaker between his father and mother (R., 145, 226)—and when Mr. and Mrs. Notley took Mrs. Danford to Honolulu he enjoyed his father's confidence, and we can find no instance of any trouble between himself and his father from that time until the time of his defalcation, in 1895. How, then, was Mr. Lidgate mistaken in saying that prior to the custom-house trouble, in 1895, there was no trouble between Charles and his father (R., 42, 44)?

From that time, January, 1888, until October, 1898, a period of nearly eleven years, there is not in the record a particle of evidence of any trouble between Charles Notley and Mrs. Danford.

As to the immateriality and irrelevancy of family quarrels see—

In re Kaufman, 117 Cal., 288.

> "The greater part of the record is taken up with the quarrel between Lizzie and her mother, apparently for the purpose of allowing the jury to conjecture that the dislike of Lizzie may have been fostered by her other sisters. Whatever the reason, it was immaterial to either of the issues submitted."
>
> *Herster vs. Herster,* 122 Pa. St., 239, pp. 260 *et seq.*
>
> *Rabb vs. Graham,* 43 Ind., 1.
>
> *In re Langford,* 108 Cal., 609, pp. 615-626.
>
> *In re Butler's Will,* 110 Wis., 70, pp. 71-75.

The record shows—without any suggestion of trouble in the family—that after the trouble in January, 1888, Charles Notley and his wife remained at the homestead for about eight months, and then moved to Honolulu, and did not return to live at Paauilo until 1895, their children having then preceded them on a vacation (R., 128).

From the evidence of Charles Notley we learn that in 1887, a change having been made in the conduct of the plantation, he obtained employment in the Government survey office in Honolulu; that in September, 1887, he visited Paauilo while on survey work with J. F. Brown—the second trouble occurring in January, 1888; that his work there lasted into 1888 (R., 225), and that he did not arrive in Honolulu until May or June, 1888, his family following him later (R., 227).

He further testifies that between 1888 and 1895 (presumably in 1890; see Exhibit 9, R., 371) he made another visit to Paauilo, being sent on survey work to Hamakua (R., 228), and on his return to Honolulu he was accompanied by his family, who had been visiting Mr. and Mrs. Notley.

There is evidence that in Honolulu he lived at his father's house in Kakaako until his father needed the place, when he came to Honolulu to attend the legislature; that he was employed in the Government survey office till 1893, when he moved to Hilo, and that he remained there until 1895, when, as his father wrote to his sister (Exhibit 16, R., 373), "Charlie, it appears, has worked himself out of ' is job; also the good graces of the Government."

Yet in the face of this evidence the court is urged by contestants to hold that there was evidence to justify the inference that by the influence of Mrs. Danford, evil or otherwise, exerted over Mr. Notley, his children were pushed aside and allowed to drift away.

Trouble between January, 1888, and October, 1898.

We will next consider what evidence as to transactions or occurrences between January, 1888, and October, 1898, was introduced by contestants for the purpose of establishing an habitual general influence to which Mr. Notley was a slave.

During this period the rose garden—lawn "dumb show"—was enacted, and, as we have already discussed it, we will pass on to the next.

(*a*) *Alterations to homestead.*

So far as we have been able to ascertain from the record, there is but one instance in which there is evidence that Mr. Notley was of one opinion and Mrs. Danford of another, and that he changed his mind and adopted her views. This is to be found in the testimony of David Notley (R., 284). It appears that David, who had learned the trade of a carpenter, in 1890 put an addition onto the homestead; that Mr. Notley had the plans made first, but changes therein were suggested by David, and Mrs. Danf rd's connection with them is shown in the following questions and answers:

"Q. Who changed it?
"A. Miss Mullinger.
"Q. Why did they change?
"A. Well, I told my father not to have it that way, but he wouldn't take my advice, but at table we were talking over it and she suggested what I wanted.
"Q. What is that?
"A. Miss Mullinger, she suggested what plan I wanted and my father agreed to it then."

This, we repeat, is the only instance in the record where there is proof that Mr. Notley changed his opinion to conform with hers, and in this instance all we find is that when the matter was discussed at the table by Mr. Notley, his son, and Mrs. Danford, Mr. Notley adopted the suggestions of his son.

(*b*) *Miss Bryant:*

In August, 1895 (after the trouble in Hilo), Charles, his wife and children came from Hilo to Paauilo (see Exhibit 16, R., 373), Charles and his wife living in one of the cottages in the yard, and the children (more particularly the two eldest girls) alternating between the main house and the cottage. The children, of whom there were four, were taught at Mr. Notley's expense by a Mr. Callendar from September, 1895, until May, 1896, when Mr. Callendar left the country, and a Miss Bryant took the school. To this lady the children were not at first sent, because Mrs. Danford objected to their going to her, giving, it is alleged, as her reason that "she (Miss Bryant) was an American and would teach us American ways." Mrs. Danford taught them for a while and later gave it up and they went to Miss Bryant (R., 315, 316).

Mr. Notley's name does not arise in connection with this incident, and we are at a loss to understand for what legitimate purpose the evidence was introduced in an American territory before an American jury, the only issue before them being that of undue influence. This incident was again called to the jury's attention in the evidence of Lily Notley (R., 345).

(*c*) *Miss Ellis:*

Another instance closely akin to this and probably for a similar purpose was introduced in evidence in connection with another American teacher—Miss Ellis (R., 416). It may be well to call the court's attention to it at this point, though it did not occur during the period under discussion (January, 1888, to October 1, 1898). Mr. and Mrs. Danford paid a visit to Paauilo (in 1900, October or November); Miss Ellis was in the habit of taking some of her meals with the family, and on one occasion at the lunch table "Mrs. Dan-

ford apologized for grandma going about in a muumuu," saying, "Excuse aunt going around in her chemise," and Miss Ellis said "she didn't mind it at all; she thought it was perfectly correct; grandma should enjoy her own home," and also "during the conversation there were some remarks passed about accents in different American places." Mrs. Danford said, "Well, it is; some Englishmen say neither (nither) and some Americans say neether, and she thought English saying was better" (R., 326). The witness (Victoria Notley) was not positive how soon after that talk Miss Ellis ceased taking her meals at the house, but she thinks "it was the following day" or "the day after" (p. 417). These incidents were laid stress upon in argument as items of an "insulting conversation"—(1) showing "hostility" to Miss Ellis, and (2) as evidencing the "subtlety of Mrs. Danford's methods."

(d) Complaint to Mr. Hughes about his daughter.

The only other incidents referred to during this period are Mrs. Danford's telephoning to Mr. Hughes about his daughter Maria during her visit to Paauilo in 1897, and on one occasion during the same visit Mrs. Danford telling her that Mr. Notley preferred taking his morning coffee alone, and that her uncle's (Mr. Notley's) knee was not the position for a young lady, and afterwards taking it herself. We wish to call the court's special attention to the evidence of Maria Hughes, which shows that Mrs. Danford at all times made friendly advances to her; that she admits having repelled Mrs. Danford, and that this girl hated and was jealous of Mrs. Danford. "From the time of making Mrs. Danford's personal acquaintance, in 1897, my feelings toward her were unfriendly" (R., 194). She had not recognized Mrs. Danford when she passed her on the street before her grandfather's death "on account of the trouble in the family" (R., 208). "They (my feelings) have been un-

friendly to her from the time I first knew or heard of her up to the present time" (R., 208). "I never kissed her; she [Mrs. Danford] kissed me" (R., 211). "I kissed her after grandfather's [Mr. Notley's] death, because mother asked me to be friendly toward her. That was the first and the last time" (R., 219, 220).

With regard to the "telephoning to Mr. Hughes," the evidence shows (R., 211-213) that at the time of this visit in April, 1897, Maria Hughes was just fourteen years old (R., 194), Victoria (Keala) was thirteen years old, and Lily two years younger. Mrs. Danford was exercising supervision over the younger girls, and Maria resented being included among the children. She says that she resented the idea of being under (Mrs. Danford's) charge, and it was a sore subject with her that she should be under her supervision; that she obeyed her "in a way"—"everything that she asked me to do that I thought was all right I would do that; if they didn't please me, then I wouldn't do them" (R., 212, 213). And we cannot condense the testimony about this telephoning better than the witness did:

> "Q. And this testimony about the telephone amounts to this: that she made a complaint in your presence to your father that you were disobeying her?
>
> "A. Yes" (R., 213).

And while making this complaint she also said, "I had better go home" (R., 211). It appears further that Mrs. Notley, on learning there was a proposition to send her home, protested and wailed, and that her protest succeeded in preventing Maria being sent away. (See evidence of Emma Notley, R., 158).

We believe that the above are all the instances of family quarrels offered in evidence as having occurred in ten—nearly eleven—years between January, 1888, and October 1, 1898, and we beg leave to summarize them:

Rose garden-lawn episode;

The alteration in the plans of the house;

Mrs. Danford's objection to Charles Notley's children being educated by an American teacher;

The complaint made by Mrs. Danford to Maria Hughes' father and her unsuccessful attempt to have her sent home.

And we call the court's attention particularly to the fact that Mr. Notley's name, even, is not mentioned in regard to the two latter.

The question the court will have to determine is whether these facts, taken singly or collectively, furnish any evidence that should have been submitted to the jury of a general influence exercised by Mrs. Danford over Mr. Notley.

Trouble between October, 1898, *and May,* 1902.

We come now to a consideration of the family quarrels and the instances showing, as it is claimed, undue influence on the part of Mrs. Danford between October 1, 1898, and the death of the testator.

(*a*) *Burning of protographs.*

There is evidence as to a Japanese house servant, a week before Mrs. Danford's marriage, when there was "a general cleaning up and burning of old things" (R., 150), being found by Mrs. Charles Notley burning some photographs in the rubbish pile, and her rescuing them from the flames (R., 149). The witness testified that the woman was "Miss Mullinger's servant" (R., 151), and later, on cross-examination, that "she did not mean that she was Miss Mullinger's private servant, but one of the servants of the house;" "that she did not know who gave the woman the album" (R., 175, 176); "that she never spoke to Mrs. Danford about the matter" (R., 152), and there is no evidence that Mrs. Danford was on the premises at the time or knew anything about it, or that Mr. Notley ever heard of it.

Counsel in referring to this incident say "Emma's (Mrs. Danford's) feeling towards Mr. Notley is shown by her *ordering* or *permitting her servant* to burn Mrs. Notley's photographs.

(*b*) *Education of children.*

The same witness says that the day before the marriage Mrs. Danford said to her "that she (Mrs. Notley) ought to be thankful that she (Mrs. Danford) got her children to be educated and that she (Mrs. Danford) had been taking good care of them." (R., 153.) Counsel say she *"falsely* claimed that she had caused the children of Charles Notley to be educated." The fact is that she did teach them herself for a short time, and there is evidence that it was at her suggestion that they were sent to Mrs. Mist's and enjoyed the same opportunities that she had had.

(*c*) *Threat against Charles Notley.*

Charles Notley testifies that on the same day as the last occurrence he had "a little row" with Mrs. Danford, and that the finale was that Mrs. Danford said to him, "Well, if that's the way you think of uncle, I will see you don't get anything out of this property." The circumstances under which this threat, in his presence alone, was uttered can be found as told by himself (R., 230, 231). The witness admits that he insulted her on this occasion; that he was mad that his father bought her a piece of property as a wedding gift to surprise her (R., 249, 250); that Mrs. Danford said she did not know anything about the property having been bought (R., 249), and that he didn't and doesn't doubt her statement that she was not aware of it (R., 254); that he told her, his own cousin (of whom Mr. Notley had written to them in 1885, see Exhibits 7 and 8, R., 369, 370), "You may be nothing—you have no claims

on him [Mr. Notley] whatever" (R., 250). "I don't know who you are." She also told him that she had been adopted by Mr. Notley.

Admitting for the purpose of this case that Mrs. Danford did make this statement, there is not a word in the record to the effect that she ever acted upon it, or that she ever addressed a word to Mr. Notley on the subject of his property, except on the single occasion when she said to him in the presence of his father, "I will see that Miss Barnard gets something out of the property," and when he immediately rebuked her.

(*d*) *Suggestion about Miss Barnard.*

In February, 1899, Mrs. Danford suggested to Charles Notley that it would be a good thing for his daughters, then fourteen and twelve years old respectively, to have Miss Barnard in the house as a companion, and asked him to speak to his mother in favor of it. He declined to do so.

His father subsequently spoke to him of it, and after some argument Mr. Notley said "that he (Mr. Notley) was boss of the place and owned the place, and he would do just as he pleased;" also, "If I cannot do just as I please, I had better shut up shop and leave;" and also, "Well, we had planned with your cousin; that is our plan. If I cannot do it, I will shut up shop and leave" (R., 232). In spite of all, however, Mrs. Danford's suggestion was of no avail. Miss Barnard did not come to the house because Mrs. Notley objected to it (R., 302, 304).

(*e*) *Mr. Notley calls Charles Notley a liar.*

A few days later occurred the scene over the scandalous rumor about some ladies referred to above, which Charles Notley admits to have been in circulation, but attributes to his mother, and when, after a hearing lasting an hour, Mr.

Notley called him a liar. This was in February, 1899. He was not driven from the home; he went to Honolulu, arriving there March 31, 1899 (R., 235), where he went for the purpose of raising money for his coffee plantation, and his wife left in April because he wrote her that he was ill (R., 131). This scene was caused by Mr. Madden, manager of Kukaiau plantation, going up to the house, confronting Charles Notley, and telling him that the statement he had made was false. Charles Notley also testifies "that he doesn't think, he doesn't know that Mrs. Danford had anything to do either with the originating or circulating of this story" (R., 256), and yet contestants say that *Emma* had caused Mr. Notley to believe that Charles had criticized her friends unfavorably.

(*f*) When Mrs. Danford was leaving after her visit of February, 1899, Mr. Notley, it appears, had made all preparations to accompany her to Honolulu—the carriage was at the door—when Mrs. Notley prevented him from going. Mr. Notley "stayed at home and he didn't go with Mrs. Danford" (R., 321, 322, 340, 341, 352, 353). John Notley testifies as follows: "After grandmother pushing him in the chair and telling him he was not to go, he said he was not going—he didn't treat her harshly" (p. 462). On this occasion Mrs. Notley pulled the buttons off Mr. Notley's vest and knocked Mrs. Danford down, and in the course of the trouble Mrs. Danford exclaimed, "Who is this woman that I should listen to her?"

(*g*) *Mr. Notley strikes his wife.*

Victoria Notley also testifies that on a Sunday morning *about a week after Mrs. Danford left,* during which time there had been frequent discussion between Mr. and Mrs. Notley in reference to Miss Barnard's coming to the house, she heard Mr. Notley say, "Take that," and a sound like

clapping of hands, and Mrs. Notley's eyes were swollen (R., 323). One thing that stands out clearly from the incidents in connection with the suggestion made by Mrs. Danford is that Mr. Notley thoroughly approved of it, endeavored to procure his son's assistance in getting Mrs. Notley's consent to it, and urged it personally upon his wife for some time after Mrs. Danford had left Paauilo, and there is nothing whatever in his conduct to justify an inference that he was acting against his own inclination and judgment; another thing equally clear is the existence of Charles' superior influence over his mother, evidenced by the fact that (not only on this but on other occasions) whenever Mr. Notley wished to secure his wife's co-operation he found it necessary to approach her through his son, and Mr. Notley believed, as he often complained, that influence was at times exerted by Charles to thwart her plans.

(*h*) *Mrs. Danford's letters to Mr. Notley destroyed by him.*

There is testimony from Keala and Lily Notley that Mr. Notley tore up the letters that he received from Mrs. Danford, and that they saw the pieces in a waste basket; that Mr. Notley left his daughter's letters with these witnesses, but that he never read Mrs. Danford's letters to them, but that *he told them about the letters,* and that to the witnesses' recollection he did not treat his other correspondence in that way; that the contents of the waste basket, which "may have been filled with torn rubbish, but not letters" (other, of course, than those of Mrs. Danford), were taken into the kitchen and burnt (R., 324, 325, 343, 350, 351). There is also the evidence of Lily Notley that she heard that some one on one occasion pieced the fragments (R., 351), but the reunited fragments were not introduced in evidence, and the efforts of *proponents* to ascertain who had pieced them together were frustrated by the objections of *contestants'* counsel. This evidence was introduced doubtless in order that

the jury might, from the fact that they were ignorant of the contents, draw the "inference" that the letters must have contained damaging evidence of undue influence—evidence created against herself. The fact that Mrs. Danford maintained a constant correspondence with Mr. Notley and that *he* tore up her letters instead of handing them over to his grandchildren was commented upon before the courts below as "viciously wrong."

(*i*) It is claimed by contestants that "Mrs. Danford showed her lack of real affection and respect and demonstrated the selfishness of her interest in Mr. Notley and of her control over him by causing his body to be removed to an undertaker's shop." We are at a loss to comprehend how this would tend to show *control* of the testator during his lifetime, but we deny absolutely that the record discloses anything that justifies this charge. The record does show (R., 265-266) that while Mr. Notley lay dying Mrs. Danford asked Mrs. Hughes "if she didn't think father had better be buried at Hamakua at the church there he has helped to build;" that Mrs. Hughes thought it was a nice suggestion; that Mr. Notley, having lived for fifty years on the Island of Hawaii, twenty-seven of which were spent in Hamakua, where he made his fortune, should be buried there; that she said she would speak to her mother about it; that she did so, and later informed Mrs. Danford that Mrs. Notley preferred to bury him in Honolulu, and that thereupon Mrs. Danford said, "When he is dead I will have nothing more to do with him." What other inference could any fair, honest-minded man draw from this other than that Mrs. Danford, recognizing that the widow's wishes as to the disposition of her husband's remains would rightfully control, refrained from pressing the matter further and resigned herself to whatever course the widow and family chose to follow. There is no evidence whatever that Mrs. Danford declined to have the funeral at her house, or that "she caused the body to be removed to an undertaker's shop." Charles Notley telephoned

to the undertaker to have the body taken to the parlors (R., 242), and the funeral was held from that place, though no reason appears why it was not held from the residence of either Charles Notley or Mrs. Hughes, both of whom were living in Honolulu.

The above are all of the incidents introduced in evidence by contestants that our research through the record has disclosed. We confess our inability to find others. Out of such as we have found there are at the most two in which it can be said that Mrs. Danford was advising the testator: (1) In the matter of the reconstruction of the main house in 1890, when, after discussion at the table, Mr. Notley yielded his opinion in deference to that expressed by not only Mrs. Danford, but his son David, and (2) in that of her suggestion that it would be a good thing after her marriage to have Miss Barnard as a companion to two girls, aged fourteen and twelve, a suggestion which Mr. Notley heartily endorsed, if anything at all can be judged from his forcible language on the subject to his son Charles, and which her "influence" was not successful in having adopted.

The majority of these instances, we submit, have not the remotest bearing on the question of undue influence; for instance, the burning of the pictures, with which Mrs. Danford is not connected, and of which there is no evidence that Mr. Notley ever heard; the objections to American teaching and American accents; the apology for the chemise; the trouble with Charles over the scandal circulated by his mother, and the passing by Mrs. Hughes' house, which is said to have occurred in October, 1901, more than two years after the will was executed.

In three of the instances cited Mrs. Danford did not have her own way, namely, in having Maria Hughes sent home in 1897; in having Mr. Notley accompany her to Honolulu in 1899, and in having Miss Barnard installed in the house as companion to the two young girls.

With the exception of the occasion when, in 1886, Charles Notley and his wife were turned out of the house, on every occasion on which Mrs. Notley protested she carried her point.

As the proponents have to be considered as admitting the facts which the contestants' evidence tended to establish, it appears that Mrs. Danford may have said and done things at times which would arouse prejudice against her in the minds of the other members of the family, but that is not the question before the court. The question is whether there was any evidence that she had dominion over Mr. Notley; that his will was subjugated to hers; that his free agency was destroyed by coercion, fraud, importunity, or otherwise; and we confidently claim that there is no direct evidence to that effect, and that there was no circumstantial evidence from which a jury could justly, legitimately, or reasonably infer that such was the case.

Mr. Notley's Treatment of His Family and Mrs. Danford Impartial.

Contestants claim that Mr. Notley sacrified his ties of kindred and family affection and obligations to please her. We submit that the record shows that he was uniformly faithful to those obligations, and that in his relations with Mrs. Danford he treated her merely as one of the family. Let us examine the evidence:

Emma (Mrs. Charles) Notley tells us that prior to Mr. Notley's visit to England, in 1885, he was very kind to her children (R., 125); that after Mrs. Danford's arrival he associated with them and noticed them, though not so much as before (R., 141); that at Mr. Notley's request, after Mrs. Danford's marriage, "they took her place" until the death of Mr. Notley (R., 153); they had been trained (at his expense) to receive and entertain (at the home of Mrs. Mist), and were taught young ladies' accomplishments; his relations with

them were very friendly (R., 154); they were treated in the same way Miss Mullinger (Emma Danford) had been—"in a loving manner" (R., 174). He contributed heavily to their education, and from 1895 to his death practically supported them (R., 153, 178).

Maria Hughes' (Jr.) evidence is that in 1897 Mr. Notley treated her "very kindly"—"with all the affection he did the others; used to kiss her and be nice to her" (R., 197). Contestants say that *"during the first part* of her visit" Mr. Notley "spoke nicely to her," &c. Her visit lasted three weeks, and there is not a particle of evidence to show that Mr. Notley's treatment of her was not the same during the whole course of the visit. In December, 1900, he treated herself and her mother "very kindly," his kindness being displayed in taking them out riding and making them presents (R., 199). His treatment of Charles was "very friendly" (R., 199). "He treated all alike" (no discrimination—no preference shown) "during my visits (1897 and 1898) to Paauilo," those at the house being "Charles Notley's four children, Miss Barnard, Mrs. Danford, grandmother (Mrs. Notley), and myself" (R., 210).

See the next question and answer:

> "Q. Everybody received the same treatment?
> "A. Yes."

She also testified that in April, 1901, he was "cool and indifferent," compared with the December, 1900, visit (R., 201), though on the same visit each of the four children received from him a "Cleveland" bicycle (R., 200).

Charles Notley testifies that in February, 1900, his daughters had taken Mrs. Danford's place in the home—"they were at school and he asked me to leave the girls come home, as Miss Mullinger was going to get married; they will stop home and take care of the place, and he would see they got a teacher" (R., 231). He received me very cordially and kindly on Christmas, 1900 (R., 236).

Mrs. Hughes says (R., 312): "He was always fairly agreeable—exceptionally so in December, 1900"—the Christmas time when he lavished presents upon them. "There was a very decided change in April, 1901—no more presents, and this change I attributed to Mrs. Danford's presence in town," when within three months of Christmas, 1900, (on which occasion (R., 299) he gave her a dress, her daughter a dress, and her two boys a suit of clothes apiece, besides an organ and a large picture of himself); he gave each of her children a Cleveland bicycle. Mark also the visits exchanged between the witness and Mr. Notley.

David's evidence is that his father, when in town, usually took him out to dine with him (Mr. Notley) on Sundays (R., 285).

From his letters to William, dated May 16, 1901, and June 18, 1901 (Exhibits 13 and 15, R., 372, 373), we learn that on his son William, who was afflicted with leprosy and confined in Molokai, he had spent over $2,000 per annum. In this connection it is claimed that he complained about the money he spent on his son, but, as has already been pointed out, there is nothing to substantiate the claim.

When he gave Mrs. Danford, his niece and adopted daughter, a horse, we know that at the same time he gave his own daughter Maria a horse (R., 286), and when he gave David $2,000 he gave Mrs. Danford the same amount.

In 1897 he gave each of his children $5,000.

When Mrs. Danford was going to be married he bought a house costing $5,000 to $6,000 as a surprise for her.

See Lily Notley's testimony: "I suppose I had the same (educational opportunities) as she had" (R., 349). Stress is laid by contestants upon the fact (as indicative of her *control* over him) that in 1886, shortly after bringing Mrs. Danford out, he gave her presents of dresses and jewelry, but we assume that the evidence as to the liberal manner in which he made presents to his children renders no comment necessary.

When he disbelieved Mrs. Danford in January, 1888, their relations were not friendly—"he was a very angry man" (R., 146). When in February, 1900, he believed Mr. Madden and disbelieved Charles Notley, he called the latter a liar.

If the above evidence shows anything plainly, it is that he was an honest, impartial man, deciding what he thought was right, and a kind and affectionate father and grandfather.

Maria Hughes, Jr., admits that "she was unfriendly to Mrs. Danford before she ever met her and is unfriendly still," and yet her testimony is that when she visited Paauilo "all, including Mrs. Danford, received the same treatment from Mr. Notley," and "all," including Miss Barnard, who is remembered in his will to the extent of $1,000, and finally "all," including Mrs. Notley, who, it is claimed, was "dishonored" in her own home and of whose honor, it is claimed, Mr. Notley should have been but was not jealous. There was no discrimination, no preference, says Maria Hughes. Does not this bear out the testimony of Mr. Lidgate, who says, "He took care of his grandchildren and treated them exactly as he did Mrs. Danford;" and also, "As far as I know, while Mrs. Danford was in the house, friendly relations existed between Mr. Notley and his family" (R., 38, 39).

And does it not also prove that Mr. Notley habitually treated Mrs. Danford in the manner he told Mr. Brown he wished to do in his will—"as one of his own children"? (R., 25).

But Charles Notley and his wife contradict this testimony! From Mrs. Charles Notley we learn that Mrs. Danford was always "trying to charm Mr. Notley" and "take away the rights of her mother-in-law," and yet of the latter she can give no specific instance (R., 161-163), and, when sifted, the methods used "to charm Mr. Notley" were Mrs. Danford's "kissing him in the morning and saying, Good morning, dear uncle," "and kissing him before she retired to bed."

"Q. How often would she kiss him during the evening?

"A. That is before she retired to bed" (R., 142).

Charles Notley says "the relations between Mr. Notley and Mrs. Danford in 1886 were very affectionate," and that he showed that affection by always picking her up, sitting on his lap and kissing, and "a good many things which the old gentleman never did before." Mrs. Danford at that time was between thirteen and fourteen years old—exactly the same age Maria Hughes, Jr., was in 1897, when she says Mr. Notley "used to kiss me and be nice to me" and when she admits she sat on his lap. See also his letters about kissing the babies "one hundred times," &c. (Exhibits 2, 4, 6, 8, R., 367-370).

How Did Mrs. Danford Treat the Family?

With the exception of the incident occurring in January, 1888, testified to by Charles Notley and his wife, that she said to Mr. Notley after he struck his wife, "Drive that black woman out of the yard" (R., 144), the statement that in 1892 she looked disgusted when Mrs. Notley was eating "ravenously" (R., 263), and "Who is this woman that I should listen to her?" when Mrs. Notley knocked her down (R., 353), in February, 1899, it does not appear that in the seventeen years that elapsed between her arrival in the country until the death of her uncle, and which have been subjected to the closest scrutiny, no incident being considered too trifling to be introduced in evidence, she ever said or did anything offensive to any member of the family.

At her wedding Miss Keala Notley was chosen as one of the bridesmaids.

The boy Tavares (the only outside witness) says: "I never heard her say anything cross to any of the Notley family—she always conducted herself as a lady" (R., 192).

Mrs. Charles Notley admitted on cross-examination (R., 162) that Mrs. Danford had never done anything or said

anything to Mrs. Notley to cause her (Mrs. Charles Notley) to dislike her. She testified also (R., 143) that she didn't know whether Mrs. Danford liked or disliked the attentions paid by Mr. Notley to her children; that Mrs. Danford never in her presence showed any indication of her feelings on the subject.

She made advances to Maria Hughes (Jr.), which the latter repelled.

It was she who, in 1902, bridged the gulf that had existed between Mrs. Hughes and herself since her wedding, and Mrs. Hughes recognized the "kindness Mrs. Danford bestowed on Mr. Notley" during his last illness, and was "trying to be as loving to her as she could" (R., 268), and after Mr. Notley's death asked her daughter to be friendly toward Mrs. Danford (R., 219).

David Notley, in coming to her house to thank her on that day after his father's funeral, showed his appreciation of the loving care she bestowed on Mr. Notley in his last sickness.

Is it reasonable to think that if either Mrs. Hughes or David had believed that she had exercised a malign and evil influence over their father their first feeling after Mr. Notley's death would have been one of gratitude toward Mrs. Danford.

It should be remembered also that as early as the year 1890 Mr. Notley had to rebuke his daughter for the manner in which she wrote to him about Mrs. Danford (see Exhibit 9, R., 370, letter, June 18, 1890):

> "I think your husband is a little too touchy—he himself often makes such remarks, and for that matter so do you: for instance, in your letter you call my niece Miss Mullinger and she is your first cousin, and you ought to call her so when you are speaking to me of her or to anybody else, otherwise you show disrespect to me and do yourself no good in other people's eyes."

Mark also the evidence of Mr. Lidgate to the effect that he never heard Mrs. Danford "make any ill-natured remarks about the Notleys, but" (especially this) "I have heard the native portion make remarks about her." Both before and after the trouble in Hilo, Charles made slighting remarks about Emma (Mrs. Danford)—"he had no use for her" (R., 36 and 45), and this evidence stands uncontradicted.

In most of the recorded cases there is evidence of a general dependence by the testator on the person alleged to have possessed and exercised undue influence over him. We look for it in vain in this record; in most also there is evidence that in business matters the testator is dominated by the unlawful influence. We do not find in the case at bar a single instance in which the business affairs of the testator were ever even discussed with Mrs. Danford by him. One of the only, if not the only, business transactions referred to in the entire record is that where Mr. Andrade secured from Mr. Notley an option on his property; he had interviews with Mr. Notley in Mrs. Danford's house, and he gives direct and positive evidence that Mrs. Danford was never present at any of them (R., 98), and that even up to the day of the trial he had never become acquainted with Mrs. Danford (R., 99).

The peculiar and marked indicia of undue influence generally to be found in the recorded cases are in this conspicuous only by their absence. Instead of evidence of substantial facts we have "trifles light as air;" for example: "Mrs. Danford's getting up for breakfast when the bell rang, if she weren't up already;" her views on American accents; on American teachers; on the chemise as a better garment, and the whisperings of a child of thirteen to her uncle on her first day in Hawaii about something we know not what, but possibly (by inference alone) the advantages and disadvantages of coffee spots on a table cloth; and instead of proof we are supplied with inferences.

The duty of contestants was to establish by evidence the fact that Mr. Notley's mind and conduct were dominated

and controlled by Mrs. Danford. At all events, in the general concerns of life (since they are forced to admit that they have no direct evidence of any undue influence exercised over the testamentary acts, and that this must be inferred, if at all, from her control over Mr. Notley in other matters) their duty was in the court below to introduce evidence and in this court to point out the evidence on which they based their contention that Mr. Notley was so dominated and controlled. They are unable to bring to the court's attention any instance in which in the general concerns of life Mr. Notley was constrained by the influence of Mrs. Danford to do that which was against his own wish and which he would not have done if free from that influence. As already pointed out and as the most minute examination of the record will show, the record is barren of any such evidence.

An examination of the facts cited in *Hoffman vs. Hoffman*, 192 Mass., 416, in which the court (following the rule uniformly laid down) held that "mere suspicion, however strong, is not of itself sufficient to warrant a finding of undue influence," will demonstrate how far that case, relied upon by contestants, differs from the case at bar. The testator's first wife died in April, 1899; he was suffering from a complication of diseases incident to his age, and "the jury might have found that mentally he was in a condition to be easily influenced by a designing person;" his second wife was 30 years of age; he met her for an hour in the presence of others in August, 1899, in Nova Scotia; a month afterwards, when he had returned to Boston, and there having been no communication between them in the meantime, he proposed to her in writing; she went up to Boston, saw him about three weeks after her arrival, became engaged to him in December, and on December 23 he was married at the age of 75, his children being neither invited to the ceremony nor informed of the marriage; he was unattractive; before the marriage she made or caused inquiries to be made about

his property; a jury would be justified in finding that the marriage was *mercenary*. If motives mercenary, undue influence was readily inferred; *without any just cause* the testator terminated friendly relations with his son; before the marriage his grandchildren were on most friendly terms, running in and out of his house at will, but this ceased; the visits of his son's wife were not returned, though the testator remained on friendly terms with her; the intimacy between testator and a friend waned, and testator explained it by saying that *his* wife was not well disposed towards the friend's wife; he made two wills after his marriage, revoking in the second a legacy of $500 to the church of which he was a member, and it was only at the suggestion of the lawyer he increased the legacies of his children from $1,000 to $2,000; the balance of his property, amounting to $50,000, was given to his wife, and at the request of the testator a memorandum was inserted in the will to the effect "that his wife did not know of the matter;" the court (p. 420) described the will as grossly unreasonable and unjust, and declined to set aside the verdict of the jury, which found that the will was the product of undue influence.

III.

WHENEVER THE EVIDENCE, WITH ALL THE INFERENCES THAT CAN JUSTIFIABLY BE DRAWN FROM IT IS SO INSUFFICIENT THAT A VERDICT UPON IT MUST BE SET ASIDE, THE COURT IS NOT BOUND TO SUBMIT THE CASE TO THE JURY, BUT MAY DIRECT A VERDICT.

The proposition appearing at the head of this subdivision has been repeatedly recognized by this court.

See *Randall vs. Baltimore & Ohio R. R. Co.,* 109 U. S., 482.

> "Where the evidence is insufficient to support a verdict for the plaintiff, so that such a verdict if returned

must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

Schofield vs. Chicago & St. Paul Ry. Co., 124 U. S., 615.

In *Patton vs. T. & P. R. R.,* 179 U. S., 658, 660, and *Pythias Knights Sup. Lodge vs. Beck,* 181 *Id.,* 49, 52, it is true that this court held that the power to direct verdicts is one whose use is attended by hazard and danger, and that such a power should never be exercised except in the clearest cases, but the court proceeds as follows:

"At the same time the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of evidence, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment.

"And if such judgment is approved by the proper appellate court, this court when called upon to review the proceedings of both courts will rightfully be much influenced by their concurrent opinions."

The propositions of law enumerated by contestants on pages 31-33 of their brief in regard to the right to have the effect of evidence determined by a jury, are elementary, but we submit that these principles are not in conflict with the proposition for which we are contending; that the cases of this court cited by contestants expressly recognize this proposition, and that the State cases cited by them are not in point, as they are for the most part authorities holding it to be error for a trial judge in charging a jury, *when he has*

left the issue to their decision, to comment upon the weight of the evidence or the credibility of witnesses in violation of constitutional or statutory prohibitions.

The doctrine that the court will pay deference to the concurring opinions of the courts below is also recognized and endorsed in *Leach vs. Burr*, 188 U. S., 510 (513), and should certainly be applied in the case at bar, wherein the trial judge, the supreme court on appeal, and again, when differently constituted, on the second motion for rehearing have concurred in holding that the evidence was so insufficient in law that the case could not be submitted to the jury.

McGuire vs. Blount, 199 U. S., 142 (148).

> "It is clear that where the court would be bound "to set aside a verdict for want of evidence to sup- "port it, it may direct a finding in the first instance, "and not await the enforcement of its view by grant- "ing a new trial."
>
> *Roberts vs. Clemons*, 202 Pa. St., 198 (200).

> "As we have more than once held, in reviewing "such cases, the trial judge sits as chancellor; if in "his opinion there was no evidence, or no sufficient "evidence to set aside the instrument, it is his duty "to give peremptory instructions to that effect to the "**jury.**"
>
> *Dobie vs. Armstrong*, 160 N. Y., 584 (594).

> "In an action under the statute to determine the "validity of the probate of a will the trial court is "not required to submit the question of the testator's "mental capacity to the jury merely because *some* "*evidence* has been introduced by the party bear- "ing the burden of proof. * * * Such cases "are fraught with the gravest consequences and I do "not believe that a solemn disposition of property "should be left to the decision of a jury upon mere "surmise, or upon inferences from facts which are as "consistent with one view as with the other."
>
> *Offcut vs. Columbian Exposition*, 175 Ill., 472 (476).

"It is of course true that there are cases in which "there is literally *no* evidence in support of some "material and necessary allegation, but there are "many others where there may be *some* evidence "tending in some remote degree to support every "allegation, yet of too inconclusive and unsubstan- "tial a character to be the foundation of a verdict. "In either of such cases the court may, when the "question is properly raised, so determine and direct "a verdict as in cases where there is no evidence."

Wyoming vs. D., L. & N. R. R. Co., 64 Mich., 93, 97.

"It is the duty of the judge when asked to do so, "before submitting the case to the jury, as a prelim- "inary question of law, to decide whether there is "any evidence on which the jury could properly "find a verdict for the party on whom the burden of "proof lies; and if there is not he ought to withdraw "it from the jury."

Purdy vs. Hall, 134 Ill., 298 (for facts see 307).
Clark vs. Jenkins, 112 Mass., 397.
McFadin vs. Catron, 138 Mo., 197.
Jackson vs. Hardin, 83 Mo., 186.
In re Calkins, 112 Cal., 296.

"In order to justify the submission of any question "of fact to a jury the proof must be sufficient to raise "more than a mere conjecture or surmise that the "fact is as alleged. It must be such that a rational, "well-constructed mind can reasonably draw the con- "clusion that the fact exists, and when the evidence "is not sufficient to justify such inference, the court "should refuse to submit the question to the jury."

See also—

Smith vs. Hamakua Mill Co., 14 Haw., 669 (679).
Englert vs. Englert, 199 Pa. St., 331.
Thompson vs. Kayner, 65 Pa. St., 379.
In re Shell's Estate, 63 Pac., 413-415.
People vs. Madison Cy., 128 Ill., 340.
Wagner vs. Ziegler, 44 Ohio St., 59.

It is claimed by contestants that the majority opinion of the supreme court of Hawaii is based on a fundamental error, to wit, that the question raised by the contestants' exceptions "is whether there was sufficient evidence of undue influence to go to the jury," and that the court, starting from wrong premises proceeded to comment upon the relative weight to be given the testimony of the witnesses, the court having rightfully nothing to do with the question of the weight of the evidence. We submit that an examination of the opinion of the court will show that in speaking of the sufficiency of the evidence the court in express terms defined it as insufficiency in law, and that the principles upon which the court below decided the case are in perfect harmony and accord with those laid down by this court and others in the decisions above cited.

The court below said (R., 382):

> "There is no doubt that in deciding the question
> "whether there was sufficient evidence of undue in-
> "influence to go to the jury, the evidence must be
> "considered in the light most favorable to the con-
> "testants; that the proponents must be considered
> "as admitting not only the facts which the contest-
> "ants' evidence tends to establish, but also every in-
> "ference which a jury might fairly draw from such
> "evidence; that in order to justify the direction of a
> "verdict for the proponents *there must be such in-*
> "*sufficiency of evidence in fact as to amount to in-*
> "*sufficiency in law;* that there must be an *absence of*
> "*material and substantial evidence,* which, if unbe-
> "lieved by the jury, would *in law* justify a verdict
> "for the contestants; that the question is not whether
> "the evidence shows in our opinion that the will and
> "codicils were procured by undue influence, but
> "whether it was such that the jury could reasonably
> "have so found."

Again (R., 395):

> "The question is * * * whether the right of
> "testator to dispose of his property as he pleased may

"be taken from him on mere *suspicions or conjec-*
"*tures,* and that, too, when he cannot be heard."

Again (R., 412), in the decision on the first motion for rehearing, the court, referring to its decision of March 8, 1904, says:

"The decisions relied on are those which hold in
"substance that a case should not be withheld from
"the jury if there is *any substantial evidence* upon
"which a verdict could properly be used. Several of
"these cases were called to the attention of the court
"in the contestants' brief; they were not overlooked
"by the court, and the decision is not in conflict
"with them. The court could not have more *clearly*
"shown that it recognized the principle contended
"for than it did by its language, at page 438, in the
"decision. To hold that a case may properly be
"taken from the jury when there is *no* evidence is
"not in conflict with the view that a case should be
"left to the jury when there is evidence."

* * * "The court (R., 413) stated in substance
"that if there was *any material evidence* it should be
"left to the jury, and the court proceeded on that
"theory."

It will be readily seen from the foregoing extracts that the court below did not start from "wrong premises," expressly recognized the different provinces of the court and jury, and in its inquiry as to the legal sufficiency of the evidence found that there was no evidence to justify the jury in finding that the final disposition of the decedent's property was the result of undue influence, and in concluding its opinion adopted the language used by this court in *Beyer vs. Le Fevre,* 186 U. S., 114, where, after referring to its rule not to examine the facts when both the trial and appellate courts below agreed, the court said:

"One who is familiar with the volume of litigation
"which is now flooding the courts cannot fail to be
"attracted by the fact that actions to set aside wills

"are of frequent occurrence. In such actions the "testator cannot be heard, and very trifling matters "are often pressed upon the attention of the court or "jury as evidence of want of mental capacity or of "the existence of undue influence. Whatever rule "may obtain elsewhere we wish it distinctly under- "stood to be the rule of the Federal courts that the "will of a person found to be possessed of sound mind "and memory is not to be set aside on evidence tend- "ing to show only a possibility or suspicion of undue "influence. The expressed intentions of the testator "should not be thwarted without clear reason there- "for."

Conclusion.

This brief is necessarily long only because we have sought to aid the labors of the court by faithful chronicle of *every* item or shred of evidence whereupon opposing counsel seek to draw the inference of undue influence. We believe that all and singular it may be truthfully said that they do not tend in the least degree to support the conclusion thus urged. They are in fact but mere trivialities from which fair minds could not justly draw the faintest semblance of undue influence when tested by either original reasoning or settled precedents.

It must be remembered that (1) the circuit court, (2) the supreme court upon the original decision, (3) again upon review, and (4) finally upon re-review and by new judges reached the same concurrent conclusion that there was in law upon the entire record no evidence to justify submission to the jury. This concurrence in conclusion is, we submit, entitled to great weight. And in the last analysis it should be also remembered that the testator had brought this niece from her home when but a child; adopted her into his family; had treated her with the same kindness he had shown his children, and when making his will provided for her as he did for all his children and with im-

partiality. The will is shown by this record to be a natural will; one which fits the natural conditions and surroundings. The duty to provide for a niece whom he had thus brought when but a child of thirteen to his distant home—had educated and treated as a daughter—would certainly and naturally appeal to him. What he did was the result of natural feeling born of close kinship and years of association. His original devise of the homestead to his son David *excluded* his widow. The change was made in her favor when by his codicil he changed the devise of the homestead from David (an unmarried son) to Mrs. Danford, but giving his wife the life occupation of the cottage which the testator said she had always occupied. William Notley was a leper, and by his affliction banished for life to the leper colony. His married daughter and son Charles were settled elsewhere. How, then, upon this record can undue influence be truthfully asserted against his niece because she enjoyed equal benefits with the children under the will? With all proof of undue influence lacking and a will natural in effect, and comporting with all the natural conditions surrounding the testator, what was left to a jury to determine? Had a verdict been rendered against the will, could the court have properly refrained from granting judgment *non obstante veredicto* or setting the verdict aside? Mr. Notley's lips were sealed forever, but taking this record by its four corners it is plain his testament spoke *his* intention; based upon *his* convictions of right and duty and demonstrating in its utterance what his conduct in life by contestants' own evidence had consistently shown—affectionate discharge of impartial kindness to his family, wherein he naturally and properly included this niece whom he had taken as his own in her childhood and whom he felt bound to treat on impartial terms with his own children, both while living and upon his death. This record shows beyond possible challenge that he was a strong, affectionate, and generous man, conducting with remarkable success a

long and honorable business career, and his testament bears equal tribute to his sense of duty and justice toward all alike. Upon this record, we submit, his solemn affirmance and reaffirmance of his testament stands without shadow of excuse for challenge or impeachment.

We submit the writ of error should be dismissed or the judgment affirmed.

Respectfully submitted,

W. L. STANLEY.
ALDIS B. BROWNE.
ALEX. BRITTON.
HENRY HOLMES.

NOTLEY v. BROWN.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII.

No. 68. Argued January 24, 1908.—Decided February 24, 1908.

Harrison v. *Magoon*, 205 U. S. 501, followed to effect that the act of March 3, 1905, c. 1465, 33 Stat. 1035, did not operate retroactively and that this court has no authority to review judgments of the Supreme Court of Hawaii, rendered prior to that date, which could not be reviewed under the previous act.

In this case it was held that the writ of error could not be sustained as to the judgment referred to therein because entered prior to March 3, 1905, and also that it could not be sustained as to a judgment in the same suit entered after the writ of error had been sued out.

THE facts are stated in the opinion.

Mr. Robert M. Morse, with whom *Mr. William M. Richardson*, *Mr. Sidney M. Ballou* and *Mr. J. J. Dunne* were on the brief, for plaintiffs in error:

It is conceded that the plaintiffs in error proceeded at the outset on the assumption that the decision of the Supreme Court of Hawaii of March 8, 1904, overruling the plaintiffs' exceptions, was the final judgment in the case, and that the United States statute of 1905 had a retroactive effect and entitled the plaintiffs in error to come into this court on a writ of error to reverse that judgment. In fact, however, the decision of the Hawaiian court on the bill of exceptions was not a final judgment, and that court could not enter a final judgment before the Hawaiian act of 1905. Even if it had been or could be considered to be a final judgment, the decision of this court in *Harrison* v. *Magoon*, 205 U. S. 501, to the effect that the United States statute of 1905 was not retroactive would deprive this court of jurisdiction.

It appears, however, that on June 8, 1905, a judgment, and

the first judgment in this case entered by any court, was entered in the Circuit Court of Hawaii and that the plaintiffs in error thereupon applied to the Supreme Court of Hawaii for a writ of error to the Circuit Court, which writ of error was granted under date of November 24, 1905, and, on motion by defendants in error to quash the same, was dismissed April 13, 1906, and that judgment thereon was entered September 27, 1907, as of April 13, 1906.

This judgment of the Hawaiian court was, in effect, an affirmance of the judgment of the Circuit Court, and was, for the purpose of a writ of error to this court, a final judgment in the case by the Supreme Court of Hawaii.

The entire record of the case is now before this court, and if it appears from inspection of the record that substantial error has been committed, to which seasonable objection was taken by the plaintiffs in error, this court has the power to correct and will correct such error. *Gregory* v. *McVeigh*, 23 Wall. 294; *Fisher* v. *Perkins*, 122 U. S. 522.

The court may treat the phrase, March 8, 1904, not as the particular date of the judgment, but as descriptive only and surplusage, and will give effect to the apparent intention of the plaintiffs in error to enforce their right to a review of the final judgment in the case by the highest court of the Territory.

The power of the court to review does not depend upon the presence or absence of any specific assignment of error. *World's Columbian Exposition Co.* v. *Republic of France*, 91 Fed. Rep. 64.

Rule 35 of the Supreme Court is to the effect that the court will notice plain errors, even though not assigned, and this court has frequently considered such errors. *United States* v. *Pena*, 175 U. S. 500, and even when no assignment of errors has been filed. *Farrar* v. *Churchill*, 135 U. S. 609; *Behn* v. *Campbell*, 205 U. S. 403.

It may be claimed, however, that because the judgment of the Hawaiian court was the quashing of a writ of error on a motion to dismiss, it was not such a judgment as can be re-

viewed by this court. No limitation as to the kind or character of the judgment to be entered is imposed by act of Congress of 1905, or by the Hawaiian act of 1905, and it is therefore to be assumed that the same rules and practice are to prevail as in cases between Federal and state courts. See *Williams* v. *Bruffy*, 102 U. S. 248.

The test as to what constitutes a final judgment to which a writ of error can be taken is whether in entering such judgment the court was affirming or rejecting a claim which the plaintiff in error sought to enforce as a matter of right, or whether it was one which the court in the exercise of its discretion might allow or not. *Walden* v. *Craig*, 9 Wheat. 510; *Pickett's Heirs* v. *Legerwood*, 7 Peters, 142; *Shreve* v. *Cheesman*, 69 Fed. Rep. 785; *Whitworth* v. *United States*, 114 Fed. Rep. 302.

In the case at bar the plaintiffs in error claimed the right to a review of the judgment of June 8, 1905, as a matter of right, and set out nine assignments of error, each raising questions of law. Nothing but questions of law were therefore before the Supreme Court of the Territory. Therefore, its judgment in dismissing the writ of error, which, as we have said, is equivalent to a decree of affirmance, is reviewable by this court.

Judgment dismissing the writ of error was in fact entered September 27, 1907, but of the date of April 13, 1906. This case falls within the United States act of 1905.

Where a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall within the law. *Railroad Co.* v. *Grant*, 98 U. S. 398; *Gurnee* v. *Patrick County*, 137 U. S. 141. The converse must also be true, that, where a law granting jurisdiction is enacted without any reservation, all pending cases fall within the law.

Even if the writ of error can bring up only the proceedings in the Hawaiian courts subsequent to the entry of judgment of June 8, 1905, the writ should be sustained as the Supreme Court of the Territory in dismissing the writ of error did so upon the ground that all the errors assigned in the petition had

been passed on by it on March 8, 1904. But the sixth and seventh assignments relate to the proceedings in the lower court had since March 8, 1904, and therefore could not have been passed upon by the appellate court.

Mr. Aldis B. Browne and *Mr. W. L. Stanley*, with whom *Mr. Alexander Britton* and *Mr. Henry Holmes* were on the brief, for defendants in error:

The act of March 3, 1905, needs no interpretation with respect to the point here involved. By its express language it takes effect and operates only "from and after its passage."

The final judgment whereof review is here sought was rendered long before its passage. Admittedly no provision for review thereof in this court then existed. No time limit for appeal or review in any higher court was provided. The cause was at an end.

Nor can the act be given retroactive effect in authorizing review of a judgment theretofore made final in the Supreme Court of Hawaii. *White* v. *United States*, 191 U. S. 545, 552. See also *United States* v. *American Sugar Refining Co.*, 202 U. S. 563; *Hooker* v. *Hooker*, 10 S. & M. (Miss.) 599, 601; *Stewart* v. *Davidson*, 10 S. & M. (Miss.) 351, 358.

While the legislative power to enlarge or restrict remedies exists, it is clearly limited to causes which are then pending, and not to those wherein there has been final judgment and the parties hence dismissed, and with the cause thus put at judicial end. *Jensen et al.* v. *Frieke et al.*, 113 Illinois, 171, 175; *Willoughby* v. *George*, 5 Colorado, 80, 82; *Davis* v. *Menasha*, 21 Wisconsin, 491; *Merrill* v. *Sherburne*, 1 N. H. 199; *Bates* v. *Kimball, Admr.*, 2 Chipman (Vt.), 77; *Lewis* v. *Webb*, 3 Maine, 326.

So in the case at bar, under the operation of the final judgment of the Supreme Court of Hawaii, now here sought to be reviewed, the rights of the parties became fixed and the property had become subject to the absolute and final disposition prescribed in the testator's will. With that property and the

rights created thereunder the community had every right to deal. In short, the cause had come to a final end. See *Gilman* v. *Tucker*, 128 N. Y. 190, 204; *Greenwood* v. *Butler*, 52 Kansas, 424; *Lewis et al.* v. *Webb*, 2 Greenleaf, 326; *Weaver* v. *Lapsley*, 43 Alabama, 224; *McCabe* v. *Emerson*, 18 Pa. St. 111; *People* v. *Carnal*, 6 N. Y. 463; *Taylor* v. *Place et al.*, 4 R. I. 324.

Mr. Justice White delivered the opinion of the court.

In a contest in a Hawaiian court of probate certain documents were held not to have been executed under undue influence, and were admitted to probate as the last will and testament and codicils thereto of Charles Notley. On appeal to the Circuit Court, in term, upon motion of the contestants, a jury was impanelled to try issues of fact embodied in two questions, which substantially required the jury to say whether undue influence had been exerted upon the testator. On the trial various exceptions were taken to rulings on the admission and rejection of evidence, and at the close of the evidence the trial judge granted a motion to instruct the jury to find a verdict sustaining the will.

The verdict was rendered January 28, 1903. On the same day the trial judge signed the following order, which was duly filed on the following day:

"Order for Entering up Judgment.

"Upon the entering up of the verdict on the appeal in this matter,

"It is hereby ordered that the clerk of this court do sign and enter up judgment in favor of proponents of the last will and testament of Charles Notley, deceased, in accordance with said verdict, and the decree admitting said will and codicils to probate is hereby affirmed.

"Done in open court at Hilo this 28th day of January, 1903."

On January 27, 1903, the clerk endorsed and filed a formal judgment. It would seem, however, that he did not then sign

the face of the judgment, and perhaps did not enter it, as following the date of the judgment is this recital:

"A. S. Le Baron Gurney, Clerk Fourth Circuit Court.

"Judgment entered this 28th day of January, 1903.

"(Seal) This 8th day of June, A. D. 1905, as of the 28th day of January, 1903."

The following endorsement is also on the back of the judgment, under the endorsement of the filing on January 29, 1903: "Filed June 8, 1905. A. S. Le Baron Gurney, Clerk." The record is silent as to how these additions to the judgment came to be made.

A motion to set aside the verdict and for a new trial having been overruled, the cause was taken on exceptions to the Supreme Court of Hawaii. In that court the action of the trial court in instructing a verdict was sustained and two motions for a rehearing were overruled, the last on August 2, 1904. 15 Hawaii, 435, 700; *S. C.*, 16 Hawaii, 66. It will be observed that the last action of the court on the application for a rehearing was had nearly a year prior to the clerk's signature affixed to the face of the judgment on June 8, 1905, as of January 28, 1903, and the additional file mark on the back of the judgment made on June 8, 1905.

More than a year after the final action of the Supreme Court of the Territory on the exceptions, that is, on November 24, 1905, a petition for a writ of error to the Circuit Court, with assignments of error, was filed in the Supreme Court of the Territory on behalf of the contestants, praying that court to reverse a judgment entered in the Circuit Court. The petition for the writ recited the order admitting the will and codicils to probate, the appeal to the Circuit Court, the trial upon specified issues of fact, the motion to direct a verdict, the instruction to sign a certain form of verdict, the verdict, the taking of various exceptions, and the overruling of motions for a new trial. No reference was made in the petition for a writ of error to the fact that the exceptions reserved at the trial had been previously taken to the Supreme Court of the

Territory and had been there decided adversely to the contestants. The petition then proceeded to recite that on June 8, 1905—which, it will be observed, was after the final action of the Supreme Court on the exceptions—the contestants had in the Circuit Court filed a motion to set aside the "Order for entering judgment," filed January 29, 1903, upon the ground that the order was obtained *ex parte* and without notice to or knowledge of contestants, and said motion was heard upon affidavit and oral evidence and was overruled, to which exception was duly taken, etc. It was further recited that on the same day, while this motion was pending, counsel for proponents moved that the clerk of the court be instructed to sign the judgment which had been previously made out on January 28, 1903, and filed on the next day, in conformity to the order of the court rendered on January 28, 1903, and that on this motion being granted by the court the judgment was entered and signed by the clerk, and the following exception was taken:

"Contestants except to the allowance of proponents' motion that the clerk of court be ordered to sign the form of judgment filed January 29th, 1903, and to the judgment so signed on the ground that such allowance is illegal, null and void and not justified by the law or evidence or record herein and to the judgment on the ground that said judgment is contrary to the law and evidence and weight of evidence and without authority of law and is illegal, null and void.

"Dated Hilo, June 8th, 1905."

The first five of the grounds set forth in the assignment of errors made for the purpose of the writ of error prayed from the Supreme Court of the Territory, as above stated, were but a reiteration of alleged errors asserted to have been previously committed by the trial court in instructing a verdict in favor of the will, and which had already been taken to the Supreme Court of the Territory on the exceptions and had been adversely passed upon by that court. The remaining assigned errors were as follows:

"Sixth. That the court erred in making the *ex parte* order of January 29, 1903, confirming the decree of Judge Little admitting the alleged will of Charles Notley to probate.

"Seventh. That the court erred in denying contestants' motion to set aside order of Judge Robinson filed January 29, 1903, confirming decree of Judge Little admitting will to probate.

"Eighth. That the court erred in ordering the clerk to sign the form of judgment submitted by proponents.

"Ninth. That the court erred in entering judgment for the proponents in said matter of the estate of Charles Notley, deceased, being petition for probate of will."

It may be observed that Judge Little was the judge by whom the will was originally admitted to probate, while Judge Robinson was the judge who presided at the trial in the Circuit Court and whose action in instructing a verdict had been approved by the Supreme Court of the Territory. The writ of error from the Supreme Court prayed under the circumstances just stated was allowed on November 24, 1905, and on December 14, 1905, a motion to quash the writ was filed upon the following grounds:

"(1) That it is apparent upon the record that this honorable court has heretofore, to wit, on the 8th day of March, 1904, on the 3rd day of June, 1904, and on the 2nd day of August, 1904, decided the questions now sought to be reviewed and embraced in the assignment of errors filed herein; and

"(2) That the petition for writ of error was not filed nor the writ issued within six months from the rendition of judgment in said cause, the same having been rendered and filed on, to wit, the 29th day of January, 1903."

After argument, for reasons stated in an opinion filed April 13, 1906 (17 Hawaii, 455), the Supreme Court of Hawaii granted the motion and dismissed the writ.

Although the court, in its opinion, declared that there was considerable force in the contention of the defendants in error that the writ should be dismissed, because the only judgment rendered below was that of January 28, 1903, and therefore

that the writ of error had not been sued out within the statutory limit, viz., six months from the rendering of the judgment, it did not rest its conclusion to dismiss upon that ground. The court, reviewing the controversy, held that every substantial question in the case had been already disposed of when the case was previously before it on exceptions. Without specifically analyzing the assignment of errors based on the action of the trial court on June 8, 1905, in directing the clerk to sign the judgment which had been made out in pursuance of the order of the court on January 28, 1903, those assignments were, in fact, treated as irrelevant or without merit, since it was held that as a necessary result of the previous action of the court in finally disposing of the exceptions, judgment was required to be entered upon the verdict by operation of law on notice to the trial court of the overruling of the exceptions.

Although as we have seen the opinion of the Supreme Court of the Territory just referred to was announced on April 13, 1906, no formal order or judgment in conformity to the opinion delivered by the court quashing the writ was entered until September 27, 1907. A few days after the delivery by the Supreme Court of the Territory of the opinion referred to, that is, on April 18, 1906, three of the contestants served a formal notice on the fourth one, calling upon him to elect whether he would join them in a writ of error to be prosecuted from this court to the Supreme Court of the Territory of Hawaii, to obtain a reversal of the judgment of the territorial court "rendered against you and us . . . on the eighth day of March, 1904, a motion for rehearing having been heard and considered, and having been denied on the 3d day of June, 1904." The contestant thus notified formally replied that he would not join the other contestants in prosecuting a writ of error to reverse the judgment rendered on March 8, 1904. Thereupon an application for the allowance of a writ of error from this court was made to the Chief Justice of the Supreme Court of the Territory. In a petition for the writ the only

judgment referred to was that claimed to have been rendered by the Supreme Court of the Territory on March 8, 1904, when the case was before that court on the exceptions. In the assignment of errors accompanying the petition it was recited that the final judgment for the reversal of which the writ of error was prayed was that rendered on March 8, 1904, and the three first grounds therein assigned exclusively related to the action of the Supreme Court of the Territory when the case was before that court on exceptions in sustaining the ruling of the trial court, in instructing a verdict. The fourth and last error assigned was as follows:

"Fourth. That the said Supreme Court of the Territory of Hawaii erred in that the said cause having been remanded to the Circuit Court of the Fourth Circuit of the Territory of Hawaii after the aforesaid judgment of the Supreme Court, and further proceedings having been taken in said cause in said Circuit Court and a writ of error dated November 25, 1905, in said cause, having been thereafter sued out by the present plaintiffs in error from the Supreme Court of the Territory of Hawaii to the said Circuit Court, the said Supreme Court quashed said writ of error."

The Chief Justice of the Supreme Court of the Territory having refused to allow the writ on the petition therefor and assignment of errors heretofore referred to, the writ was allowed by a justice of this court. The transcript of the record was filed in this court on July 20, 1906.

On November 28, 1906, a motion was made to dismiss the writ of error for want of jurisdiction. In the brief filed on behalf of the defendants in error it was insisted that prior to the act of March 3, 1905 (33 Stat. 135), the power of this court to review the judgments and decrees of courts of the Territory of Hawaii was governed by the rules relating to the right to review judgments and decrees of state courts, and that as the cause presented no question which would justify a review if the judgment had been rendered in a state court, there was therefore no jurisdiction. It was conceded that a broader and

different right as to the courts of the Territory of Hawaii had been conferred by the act of March 3, 1905, but it was urged that that act did not confer jurisdiction because the judgment of the Supreme Court of the Territory to which the writ of error was addressed had been rendered prior to the passage of the act of 1905, and as that act had no retroactive effect, there was no jurisdiction. Whilst admitting that the controversy involved no question giving the right to review if the judgment had been rendered in a state court, and therefore there could be no review under the prior act, plaintiffs in error insisted that there was power to review under the act of March 3, 1905, because that act operated retroactively. The motion was not passed upon, but was postponed to the hearing on the merits.

At the same term (October term, 1906), however, and some months after the motion to dismiss had been postponed to the hearing upon the merits, the question involved in that motion arose in another case, and it was decided that the act of March 3, 1905, did not operate retroactively, and therefore that this court had no authority to review a judgment or decree of a court of the Territory of Hawaii rendered before the passage of the act which could not be reviewed under the previous act. *Harrison* v. *Magoon*, 205 U. S. 501.

Five months after the decision just referred to in the *Magoon case*, what is styled a judgment was entered by the Supreme Court of Hawaii, concerning the action of that court in quashing the writ of error from that court to the lower Circuit Court previously referred to. Omitting the title of the cause and the signature of the clerk, the so-called judgment is copied in the margin.[1]

[1] Defendants in error above named having made a motion to quash the writ of error issued herein on the 25th day of November, A. D. 1905, upon grounds therein set forth, to wit:

(1) That said writ was not issued within six months from the rendition of judgment; and

(2) That all errors assigned have been heretofore decided by this court in 15 Hawaiian Reports, pages 435, 700, 16 Hawaiian, 66; and said motion com-

At the present term, on October 14, 1907, a stipulation of counsel was filed, adding to the record as omitted matter the petition for a writ of error from the Supreme Court of the Territory, the assignment of errors, the writ of error, the motion to quash the said writ of error, and the so-called judgment of September 27, 1907, quashing the same, to which we have previously referred.

With these facts in mind, we come to consider the controversy. At the outset we must dispose of the motion to dismiss, which we have previously said was made at the October term, 1906, and was postponed to the hearing on the merits.

As on its face the writ of error in terms is directed to the supposed judgment of the Supreme Court of Hawaii, rendered March 8, 1904, disposing of the case on exceptions, and there is no pretense of the existence of a Federal question among the issues arising on the exceptions, it is obvious that as a result of the decision in *Harrison* v. *Magoon*, *supra*, we are without jurisdiction to review by writ of error the judgment to which the writ runs. But although the writ of error is specifically addressed to the judgment of March 8, 1904, and all the grounds previously urged to maintain jurisdiction have been determined to be untenable, it is now pressed that there is jurisdiction upon other and different grounds which are, in fact, wholly incompatible with those previously taken. Let us consider these grounds.

It is urged that the Supreme Court of Hawaii did not render a judgment in 1904, and indeed it is asserted that that court had no power to render a judgment in passing on a case

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ing on to be heard, now after reading and filing said motion to quash said writ of error and after hearing W. L. Stanley, Esq., of counsel for defendants in error in support of said motion, and S. M. Ballou, Esq., of counsel for plaintiffs in error in opposition thereto, and due deliberation having been had, it is

Ordered, adjudged and decreed that said motion to quash the writ of error issued herein on the 25th day of November, 1905, be and the same is hereby granted, and that said writ be and it hereby is dismissed.

Dated Honolulu, September 27th, A. D. 1907, as of April 13, 1906.

taken up on exceptions. The claim, therefore, really is that although the judgment to which the writ of error is in terms addressed was no judgment, yet the writ should be sustained. Aside from the contradiction, this contention must rest upon one or two assumptions: 1st. That there was no final judgment susceptible of being reviewed by a writ of error until June 8, 1905, when, it is asserted, a judgment arose for the first time by the making of an order by the trial court directing the clerk to sign *nunc pro tunc* the judgment which had been previously prepared by the clerk in pursuance of the express order of the court in consequence of the verdict of the jury. Although this judgment was not only written up in 1903, but was endorsed filed on January 29, 1903, the argument is that as it was not signed on its face by the clerk when it was so filed it could not take effect as a judgment until the date of the actual signing on its face by that officer as a consequence of the *nunc pro tunc* order. 2d. That this writ of error must be treated, despite its terms, as if it were addressed to the action of the Supreme Court of Hawaii in quashing the writ of error on August 13, 1906.

In considering the first proposition it is to be observed that there is nothing in the record disclosing any ruling by the trial court concerning the order for the signature *nunc pro tunc* of the judgment or any exception taken to such a ruling. We say this because, leaving out of view some allusions made to the subject in the opinion of the Supreme Court of the Territory quashing the writ, the only reference to these matters is found in recitals contained in the application to the Supreme Court of Hawaii for a writ of error, which was stipulated into the record long after the writ in this case was allowed and the record filed here. But waiving any infirmity, and assuming that we may look at mere recitals in the petition for the writ of error from the Supreme Court of the Territory, the situation, if the contentions be well founded, is then this, that the only judgment susceptible of being reviewed was one which it was claimed was entered in the trial court in connection with the *nunc pro*

tunc entry, after the action of the Supreme Court of the Territory overruling the exceptions, and therefore after the judgment of that court which the writ seeks to review. And a consideration of the second proposition leads to a like result. Conceding that the writ of error, although it is in terms addressed to the action of the court on the exceptions, may now be treated as being addressed to its action in 1906 in quashing the writ of error, and further conceding, for the sake of argument only, that the judgment of the territorial court in refusing to consider the case on its merits and quashing the writ of error could, under any circumstances, be treated as a final judgment susceptible of being reviewed here by writ of error, nevertheless there is no judgment before us which we can review. This follows because, as shown by the statement which we have previously made, at the time when this writ of error was taken no judgment whatever had been entered in the Supreme Court of Hawaii giving formal expression to its decision quashing the writ. Indeed, the judgment so doing was only entered in that court, as we have seen, September 27, 1907, long after the record in this case had been filed here and the motion to dismiss the writ had been made and submitted on briefs of counsel and had been postponed to the hearing on the merits. In fact, no such judgment was entered until after the decision of this court in the *Magoon case*. The argument which seeks to have the writ of error from this court which is directed to one judgment applied to another rendered long after the writ of error was sued out, can only rest upon the assumption that the entry of the judgment below in 1907, after the writ of error was sued out, must be treated as relating back to the time in 1906, when the opinion of the court quashing the writ was announced. But if we apply this rule to the judgment in question we would have to apply it also to the judgment of the Hawaiian Circuit Court rendered January 28, 1903, and therefore we shou'd be obliged to say, irrespective of the reason assigned by the Supreme Court of the Territory, that that court had rightly quashed the writ of error for want of juris-

diction, since it is conceded that under the statutes of Hawaii a writ of error must be sued out within six months from the rendition of judgment.

The considerations just stated make it inevitable that this writ of error should be dismissed. Of course, it may be that the reasons which we have given do not necessarily foreclose the right within the statutory time to prosecute a new writ of error to the judgment of the Supreme Court of the Territory of Hawaii, quashing the writ, entered September 27, 1907. On that subject, however, we observe, to the end that this litigation may not be unnecessarily prolonged, that because we do not decide the question not before us, as to whether such right to a new writ of error exists, we must not be considered as in the slightest degree intimating an affirmative view as to the existence of such a right.

Writ of error dismissed for want of jurisdiction.